80-1559

Office-Supreme Court, U.S.
FILED
MAR 4 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

JUDGE JAMES J. ZELLER

Petitioner

v.

MARCUS W. RANKIN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT T. STEPHAN
Attorney General of Kansas

BRUCE E. MILLER
Deputy Attorney General of Kansas

Kansas Judicial Center
Second Floor
Topeka, Kansas 66612
913/296-2215

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

JUDGE JAMES J. ZELLER

Petitioner

v.

MARCUS W. RANKIN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT T. STEPHAN
Attorney General of Kansas

BRUCE E. MILLER
Deputy Attorney General of Kansas

Kansas Judicial Center
Second Floor
Topeka, Kansas 66612
913/296-2215

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Did The Ninth Circuit Court Of Appeals Err When It Held That A Judge Would Lose His Judicial Immunity From Suit In 42 U.S.C. §1983 If He Participated In An Ex Parte Agreement To Violate, By Doing A Judicial Act, The Civil Rights Of Another Person?

II. Did The Ninth Circuit Court of Appeals Err When It Held That A Judge Who Had Subject Matter Jurisdiction But Who Acted In The Clear And Complete Absence Of Personal Jurisdiction Lost His Judicial Immunity From Suit Under 42 U.S.C. §1983?

III. Did The Ninth Circuit Court Of Appeals Err When It Held That An Ex Parte Conference Held Prior To A Hearing Was A "Non-Judicial" Act?

LIST OF ALL PARTIES

As filed in the United States District Court of Arizona, this action listed the following parties:

MARCUS W. RANKIN, Plaintiff; WAYNE HOWARD and JANE DOE HOWARD, his wife; JOSEPH ALEXANDER, SR. and ESTHER ALEXANDER, HIS WIFE; JOSEPH ALEXANDER, JR. and JANE DOE

ALEXANDER, his wife; MICHAEL E. TRAUSCHT and JANE DOE TRAUSCHT, his wife; FREEDOM OF THOUGHT FOUNDATION, an Arizona corporation; WILLIAM J. RANKIN and WILMA E. RANKIN, his wife; JAMES J. ZELLER; S. MITCHELL MACK, JR. and JANE DOE MACK, his wife; GARY SCHARFF and JANE DOE SCHARFF, his wife; STEVE LOTZ and JANE DOE LOTZ, his wife; GARY CONKLIN and JANE DOE CONKLIN, his wife; AND LAWRENCE GUMBRINER and JANE DOE GUMBRINER, his wife, Defendants. This case is still active at the district court level.

Judge James J. Zeller, Wayne Howard, and Michael E. Trauscht were dismissed from the district court action on April 7, 1978. Rankin v. Howard, et al., 457 F.2d 70 (D.Ariz. 1978). (Appendix A, page 1.)

In the Ninth Circuit Court of Appeals, the parties were: MARCUS W. RANKIN, Appellant, v. WAYNE HOWARD, MICHAEL E. TRAUSCHT, and JUDGE JAMES J. ZELLER,

Appellees. Rankin v. Howard, et al., 633 F.2d 844 (9th Cir. 1980) (Appendix A, page 7.)

In this petition for certiorari, the parties are: JUDGE JAMES J. ZELLER, Petitioner, v. MARCUS W. RANKIN, Respondent.

OPINIONS BELOW

The judgment of the United States District Court for the District of Arizona was entered on July 7, 1978. Said judgment is reported at 457 F.Supp. 70, and is reproduced in Appendix A herein, starting at page one (1). Rankin v. Howard, et al., 457 F.Supp. 70 (D.C. AZ. 1978).

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 5, 1980, and is reproduced in Appendix A herein, starting at page seven (7). Rankin v. Howard, et al., 633 F.2d 844 (9th Cir. 1980).

JURISDICTION

This petition for certiorari seeks review of the decision of the Ninth Circuit Court of Appeals as filed on December 5, 1980, in Rankin v. Howard, et al., 633 F.2d 844 (9th Cir. 1980) (Appendix A, page seven (7).)

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1), and pursuant to Rule 17.1(a) of the Rules of the Supreme Court of the United States in that the opinion of the Ninth Circuit Court of Appeals in this action is contra to the teachings and law of this Court in Randall v. Brigham, 74 U.S. 523 (1869); Bradley v. Fisher, 80 U.S. 335 (1872); Pierson v. Ray, 386 U.S. 547 (1967); Stump v. Sparkman, 435 U.S. 349 (1978); and Dennis v. Sparks, _____ U.S. _____, 66 L.Ed.2d 185, Case No. 79-1186 (Nov. 17, 1980)and because there is a clear circuit conflict with the Fifth Circuit on the issue whether ex parte

conferences between a judge and one side to a proceeding are non-judicial acts, in that the Fifth Circuit held they were judicial acts, In re Georgia Paneling Supply, Inc., 581 F.2d 520, 521 (5th Cir. 1978), cert. denied after second rehearing (613 F.2d 137 (5th Cir. 1980)) sub nom. Quinault Pacific Corp. v. Aetna Business Credit, Inc., 49 U.S.L.W. 3332 (1980), rehearing denied, 49 U.S.L.W. 3495 (1981).

STATUTES INVOLVED

The statutes, as constituted in December, 1976, granting guardianship authority to district magistrate judges in Kansas, were K.S.A. 1975 Supp. 20-302b and 59-3001, et seq., which are reproduced in Appendix B.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW. . . . ii

LIST OF ALL PARTIES ii

OPINIONS BELOW. iv

JURISDICTION. v

STATUTES INVOLVED vi

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES. viii

STATEMENT OF THE CASE 1

UNITED STATES DISTRICT COURT JURISDICTION. 6

REASONS FOR GRANTING WRIT 6

CONCLUSION. 28

APPENDIX A

Rankin v. Howard, 457 F.2d 70 (D.Ariz. 1978) . . . 1

Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980) . . 7

APPENDIX B

K.S.A. 1975 Supp, 59-102 1

K.S.A. 1975 Supp. 59-301 2

K.S.A. 1975 Supp. 59-3001, et seq. 3

TABLE OF AUTHORITIES

Bradley v. Fisher, 80 U.S. 335 (1872) 6,7, 13,18, 20,28

Dennis v. Sparks, ____ U.S. ____, 66 L.Ed.2d 185 . . . . . 6,9 10,11, 12,28

Georgia Paneling Supply, Inc., In Re, 581 F.2d 520, 521 (5th Cir. 1978), cert. denied after second hearing (613 F.2d 137 (5th Cir. 1980)), sub nom. . . . 25

Moore v. Brown, 49 U.S.L.W. 3162 (1980) 26,28

Pierson v. Ray, 386 U.S. 547 (1967) . 6,7 28

Quinault Pacific Corp. v. Aetna Business Credit, Inc., 49 U.S.L.W. 3332 (1980), rehearing denied, 49 U.S.L.W. 3495 (1981) 26,28

Randall v. Brigham, 74 U.S. 523 (1869) 6,13, 28

Sparks v. Duval County Range Company, Inc., 604 F.2d 976 (5th Cir. 1979). 10,27

Stump v. Sparkman, 435 U.S. 349 (1978) 6,8, 12,14, 28

STATUTES

28 U.S.C. §§1343, 1331(a) 4

42 U.S.C. §§1983, 1985, 1986. 4

K.S.A. 1975 Supp. 59-301(6) 2

K.S.A. 1975 Supp. 59-3001, et seq.. . 8,16

K.S.A. 1975 Supp. 50-3005. 2

K.S.A. 1975 Supp. 59-3009 16

IN THE

SUPREME COURT OF THE UNITED STATES

1[illegible] October Term, 1980

[illegible] No. _____

[illegible]EJUDGE JAMES J. ZELLER

[illegible] Petitioner

v.

[illegible]NKI MARCUS W. RANKIN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS [illegible]FOR THE NINTH CIRCUIT

[illegible]HE STATEMENT OF THE CASE

[illegible]ePetitioner, Judge James J. Zeller, was the district magistrate judge (probate

judge) in Pottawatomie County, Kansas, in December, 1976. Judge Zeller had full and exclusive jurisdiction over guardianship proceedings in Pottawatomie County, Kansas. See K.S.A. 1975 Supp. 59-301(6), (Appendix B, page two 2), and K.S.A. 1975 Supp. 59-3005, (Appendix B, page 4.)

An ex parte proceeding was held before Judge Zeller on December 25, 1976, to consider the application of William J. Rankin, respondent's father, for temporary appointment of a guardian/conservator for Marcus W. Rankin, respondent herein. The father of respondent stated his belief that his son was then a mentally ill and incapacitated person who was unable to make responsible decisions concerning his person because the child was the victim of mind control through hypnosis, mesmerism, and brainwashing, as forced upon him by the Unification Church (Moonies).

The father of the respondent falsely stated in the application and supporting affidavit that respondent was currently residing in Pottawatomie County. After statements by the father's attorney, Wayne Howard, that respondent would be in Pottawatomie County, Kansas, at a time certain, and after waiting for that time to occur, Judge Zeller appointed respondent's father temporary guardian over respondent, with authority to exercise personal custody and provide examination and counseling pending final determination of the guardianship application. The hearing on the permanent guardianship appliction was set for January 11, 1977, and Charles Andrews, attorney, was appointed to represent Marcus W. Rankin in those future proceedings.

Respondent, Marcus W. Rankin, who was then physically present in Pottawatomie County, Kansas, was taken into custody under

the court's order. He was then transported to Phoenix, Arizona, for deprogramming, where, after nine days, respondent escaped custody.

Upon rejoining the Unification Church, respondent filed an action in the United States District Court for Arizona, naming as defendants his parents, their attorneys, Judge Zeller, and many others. Violations of 42 U.S.C. §§1983, 1985, and 1986 were averred, as well as various common law torts. The claim against Judge Zeller alleged conspiracy to violate respondent's civil rights under section 1983. Jurisdiction was claimed under 28 U.S.C. §§1343 and 1331(a), with pendant jurisdiction over the tort claims.

Judge Zeller moved for summary judgment as to the claim against him, asserting judicial immunity. The district court agreed and dismissed the action as to Judge Zeller. See Appendix A, page one (1). On appeal, the Court of Appeals for the Ninth

Circuit reversed the dismissal of the lower court, stating that if Judge Zeller knew the residence allegations of the application were false, then he acted in a clear absence of personal jurisdiction and thus lost his judicial immunity; and, further, if Judge Zeller had agreed in advance to grant a guardianship, such a grant was a nonjudicial act and thus he would lose his judicial immunity. See Appendix A, page seven.

The court ordered Judge Zeller's immunity suspended pending factual determination of these matters, either of which, the court stated, would make him liable to suit.

Judge Zeller now files this petition for a writ of certiorari because he feels the Ninth Circuit failed to follow the teachings and law of this Court.

UNITED STATES DISTRICT COURT JURISDICTION

This case as originally filed claimed federal jurisdiction pursuant to 28 U.S.C. §§1343 and 1331(a), for the causes of action arising under 42 U.S.C. §§1983 and 1985, and pendent jurisdiction over the claims arising under state law.

REASONS FOR GRANTING THE WRIT

I. This Petition Should Be Granted By This Court Because The Decision Of The United States Court Of Appeals For The Ninth Circuit Conflicts With And Represents An Unwarranted Departure From The Applicable Decisions Of This Court Concerning Judicial Immunity.

Petitioner submits that this Court should review this case because the court below ignored the teachings and law developed by this Court in Randall v. Brigham, 74 U.S. 523 (1869); Bradley v. Fisher, 80 U.S. 335 (1872); Pierson v. Ray, 386 U.S. 547 (1967); Stump v. Sparkman, 435 U.S. 349 (1978); and Dennis v. Sparks, _____ U.S. _____, 66

L.Ed.2d 185, Case No. 79-1186 (Nov. 17, 1980), which enunciate doctrines concerning judicial immunity.

The Ninth Circuit found that if Judge Zeller entered into a private prior agreement (a corrupt conspiracy) to decide in favor of one party, then that act was a non-judicial act and thus, Judge Zeller would lose his judicial immunity and be liable in a civil rights suit for his subsequent judicial act of granting a temporary guardianship. (Appendix A, pages 9 and 10.) This is clearly contra to the law of this Court.

This Court in Bradley, supra, and Pierson, supra, clearly established the doctrine that judges defending against civil rights actions enjoy absolute immunity from liability for their judicial acts. In Bradley, after discussing the historical reasons for judicial exemption from liability for judicial acts, the Court stated:

> Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. Bradley, at p. 347.

This Court in Stump, supra, identified two specific factors to be considered in determining whether an act is "judicial": "the nature of the act itself, i.e., whether it is a function normally performed by a judge, and . . . the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." (Stump, at 362.) It is not questioned in this case that Judge James J. Zeller was the district magistrate judge in Pottawatomie County, Kansas, and that he had jurisdiction over all guardianship proceedings in Pottawatomie County, Kansas, K.S.A. 59-3001, et seq., as amended. See Appendix B. Nor, is it questioned that all parties dealt with Judge Zeller in his

official capacity as a judge. It is not questioned that Judge Zeller's order appointing petitioner's father as a temporary guardian over the petitioner was a judicial act. It is this act, broadly construed, which the Ninth Circuit should recognize is immunized.

This Court in Dennis, supra, held that even where a judge acting outside the courtroom corruptly conspires with other people to do a judicial act which violates the civil rights of third parties, he is clothed with judicial immunity, both as to the conspiracy and the in-court judicial act. The Ninth Circuit failed to follow the dictates of this Court in Dennis, supra.

The judge in the Dennis case had accepted a bribe to conspire with four other persons to deprive the plaintiffs in that action of their oil production. The judge later, and in court, performed a judicial act by entering an injunction against the

plaintiffs in furtherance of the corrupt conspiracy. The Fifth Circuit held the judge to be immune even though he corruptly conspired out of court to do the judicial acts which would enjoin the plaintiffs and deny to the plaintiffs due process of law. Sparks v. Duval County Range Company, Inc., 604 F.2d 976 (5th Cir. 1979); Dennis v. Sparks, _____ U.S. _____, 66 L.Ed.2d 185 (1980).

The district court in the Dennis case had "concluded that because the injunction was a judicial act within the jurisdiction of the state court, the judge was immune from liabilty in a §1983 suit, whether or not the injunction had issued as the result of a corrupt conspiracy." Dennis, supra, at p. 185. This position of the district court was upheld by the Fifth Circuit in Sparks v. Duval County Range Company, Inc., supra.

This Court, when reviewing the Fifth Circuit's opinion, upheld and reaffirmed the position of the district court saying:

> Based on the doctrine expressed in Bradley v. Fisher, 13 Wall. 335 (1872), this Court has consistently adhered to the rule that "judges defending against Sec. 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. Pierson v. Ray, 386 U.S. 547 (1967); Stump v. Sparkman, 435 U.S. 349 (1978)." Supreme Court of Virginia v. Consumers Union, 447 U.S. _____, _____, (1980). The courts below concluded that the judicial immunity doctrine required dismissal of the section 1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on immunity grounds. (Emphasis supplied.) (Dennis v. Sparks, _____ U.S. _____, 66 L.Ed.2d 185, 189 (1980).)

This Court went on to hold that official judicial acts must be broadly construed and include situations where "the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge." Dennis, at p. 190.

Assuming, as the Ninth Circuit concluded, that Judge Zeller had entered into a private, prior agreement to decide in favor of one party, that act, under Dennis, supra, is still an official judicial act and, therefore, Judge Zeller retains his absolute immunity from damages liability in this action. The Ninth Circuit did not "broadly construe" official judicial acts as required by this Court in Dennis, supra, and Stump, supra, and this Court should grant Judge Zeller's application for a Writ of Certiorari to correct manifest injustice.

The Ninth Circuit also found, after erroneously finding the question to be one of first impression, that Judge Zeller would lose his judicial immunity if he had knowingly acted in the complete absence of personal jurisdiction over the petitioner. Appendix A, page 13. This doctrine is clearly contra to the law as set by this Court as the Ninth Circuit Court of Appeals failed

to acknowledge or follow the "clear absence of all jurisdiction" test as dictated by this Court in many cases.

This Court in Randall v. Brigham, 74 U.S. 523 (1869) stated that judges are not responsible "to private parties in civil actions for their judicial act, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly." Randall, at 537.

This Court had qualified the concept of judicial immunity in Randall, but in Bradley v. Fisher, 80 U.S. 335 (1872), this Court reconsidered the Randall statement of qualification and concluded:

> (T)hat the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their

jurisdiction, and are alleged to have been done maliciously or corruptly. Bradley at 351.

This Court in Stump v. Sparkman, supra, in discussing judicial immunity, stated:

> The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, (should) be free to act upon his own convictions, without apprehension of personal consequences to himself." Bradley v. Fisher, supra, at 347. For that reason the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable in suit under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. Sec. 1983, for the legislative record gave no indication that Congress intended to abolish

this long-established principle. Pierson v. Ray, 386 U.S. 547 (1967).

> The Court of Appeals correctly recognized that the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him. Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . . ," Bradley, supra, at 352, the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." 13 Wall., at 351. Stump, at 355-357.

In the case at bar, the Ninth Circuit misconstrued the "clear absence of all jurisdiction" to mean "possible lack of personal jurisdiction."

No party or person denies that Judge Zeller was the probate judge of Pottawatomie County, Kansas. His court had exclusive jurisdiction in Pottawatomie County, Kansas, for guardianship proceedings, K.S.A. 59-3001, et seq., as amended. Appendix B, page 3. Judge Zeller clearly had subject matter jurisdiction over guardianship proceedings concerning the respondent.

As to personal jursidiction over respondent, Kansas law provides that an application for an involuntary conservatorship may be filed in the place of residence or presence of the proposed conservatee. K.S.A. 59-3009 states:

> Any person may file in the probate court of the county of the residence or presence of the proposed ward a verified application for the appointment of a guardian. . . . (Emphasis supplied.) Appendix B, page 5.

In considering an application for appointment of a conservator, a Kansas judge has jurisdiction over the person if either of

these requirements is met. In district court, the parties to this action stipulated this was the law.

On the face of the pleadings and testimony in this case, both residency and presence were established, but as known to all persons, the proposed ward, respondent, was not a resident of Pottawatomie County, Kansas. The respondent's father "falsely," but not misleadingly, stated in his guardianship application that respondent was a resident of Pottawatomie County, Kansas.

Judge Zeller made specific inquiry of Attorney Wayne Howard as to the presence of respondent and determined respondent was physically present in St. Marys, Kansas, a city located in Pottawatomie County, Kansas, and, thereafter, issued the temporary guardianship orders. The record clearly shows Judge Zeller certainly did not act in clear absence of even in personam

jurisdiction, a fact the Ninth Circuit chose to ignore in its opinion.

Even assuming Judge Zeller made an erroneous decision and did not have personal jurisdiction over respondent, the Ninth Circuit erred because the law as set by this Court in Bradley and Stump clearly requires "a judge must act in a clear absence of all jurisdiction" before he loses his judicial immunity from civil damages.

This Court, when discussing a situation where the judge had subject matter jurisdiction but may have made an error in determining personal jurisdiction, stated:

> The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts, existing when there is jurisdiction of the subject matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could also be made, and if the motives could

> be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must in such cases resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed. Bradley, at 354.

The non-lawyer judge, like Judge Zeller, certainly has need of being allowed a broad interpretation of his jurisdiction. Yet, the Ninth Circuit Court of Appeals has indicated "(a)n absence of personal jurisdiction may be said to destroy 'all jurisdiction.'" Appendix A, page 11. A policy of broad construction of jurisdiction as set by this Court should not be so easily destroyed. Judge Zeller had subject matter

jurisdiction and testimony which, if accurate, would invoke personal jurisdiction over respondent. Judge Zeller did not act in a "clear absnece of all jurisdiction." He should not lose his judicial immunity in this action, just because the Ninth Circuit Court of Appeals wants to establish a new "test" which is contra to the teachings and dictates of this Court.

II. This Petition Should Be Granted Because This Case Represents An Issue Of National Importance Which Will Affect The Scope Of Exposure To Personal Liability Of Every Trial Court Judge In Our Country.

The doctrine of absolute judicial immunity from damages liability exists not only for the protection of a judge, but also exists for the benefit of the public.

This Court, when discussing the public policy aspects of judicial immunity over a hundred years ago, stated:

> For it is a general principle of the highest importance to the proper administration of justice

that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. Taaffe v. Downes, 3 Moore, P.C. 41, n.

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.

It has, as Chancellor Kent observes, "a deept root in the common law." Yates v. Lansing, 5 Johns. 291.

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of Floyd and Barker, reported by Coke, in 1608 (12 Coke, 25) where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the King himself, and it was observed that if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations."

The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties and, consequently, exciting the deepest feelings, are being constantly determined in those courts, in which there is a great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest

labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a

> judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.
>
> If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party--and that judge perhaps one of an inferior jurisdiction--that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party. (Bradley, at 347, 348.)

The public policy thus stated is just as applicable and maybe even more important today.

The practical results of the Ninth Circuit Court of Appeals' decision would be to

render useless the long established standards for judicial immunity and would subject the judiciary to many frivilous suits whenever the plaintiff would merely claim no personal jurisdiction or conspiracy in a civil rights action.

III. This Petition Should Be Granted Because There Is A Clear Conflict Between The Ninth And Fifth Circuit Courts Of Appeal.

The Fifth Circuit recently had a case believed to be unique in that circuit where two rehearings were granted the same case, notwithstanding (or possibly because) the Fifth Circuit had ruled that incriminating affidavits (and timeslips thereto appended) and depositions of counsel were not a part of the record. In re Georgia Paneling Supply, Inc. concerned a bankruptcy judge who had engaged in four months of ex parte work sessions with a trustee in bankruptcy and a secured creditor in a vigorously contested pending action involving

unsecured creditors opposed to a $350 settlement between the trustee and the secured creditor.

The Fifth Circuit first denied a petition for allowance of appeal, holding that, "The occurrence of ex parte conferences between the bankruptcy judge, the trustee, and Aetna's lawyer alone do not demonstrate collusion." 581 F.2d 520, at 521 (5th Cir. 1978). The circuit then vacated the opinion, "Because of allegations of judicial misconduct. . . " (588 F.2d 93). On a rehearing a second panel listed the misconduct in the following language: "The bankruptcy judge is also alleged to have engaged in ex parte discussion with appellees and their counsel, permitted orders and an opinion to be drafted and typed by appellees or their counsel, and misrepresented the facts regarding this alleged misbehavior." 607 F.2d 117 (5th Cir. 1979). The court ruled that a careful examination of the record

revealed no impropriety and the allegations of misconduct were unfounded. However, that same panel then granted a second petition for rehearing. On rehearing before a panel of two new circuit judges and one senior district judge, the panel held the appeal was not frivolous but reinstated the prior opinion (which in itself is inherently contradictory because the appeal had been granted solely because of allegations of judicial misconduct) which act of reinstatement in another context drew Mr. Justice Powell's disapproval. Moore v. Brown, 49 U.S.L.W. 3162 (1980). The editors of United States Law Week summarized the complete case in the following dramatic language: "Four months of ex parte work sessions, impropriety not demonstrated."

It is, therefore, clear there is a circuit conflict with the Fifth Circuit on two issues: (1) Is Judge Zeller entitled to judicial immunity? Yes: Sparks v. DuVall

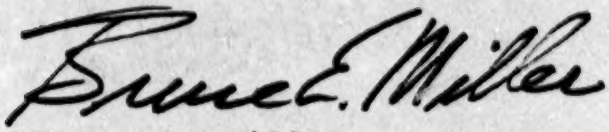
Ranch Co. (2) Are not ex parte work sessions judicial acts, regardless of their purpose of frequency, and regardless of whether there is an agreement? Yes: In re Georgia Paneling Supply.

CONCLUSION

It is of the utmost importance to the Judicial System of the United States that judges retain the protection of the doctrine of judicial immunity as set forth in Randall v. Brigham, supra; Bradley v. Fisher, supra; Pierson v. Ray, supra; Stump v. Sparkman, supra; and Dennis v. Sparks, supra. The opinion of the Ninth Circuit Court of Appeals in refusing to grant Judge James J. Zeller the immunity provided under these cases erodes the clarity of the doctrine to such an extent that resolution by the United States Supreme Court is required.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas



Bruce E. Miller
Deputy Attorney General
of Kansas

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit was served by depositing same in the United States Mail, first class postage prepaid, this 3rd day of March, 1981, to:

DAVID J. KARASEK, ESQ., 2104 First Federal Savings Building, Phoenix, Arizona, 85012; J. TYRRELL TABER, ESQ., 1800 First Federal Savings Building, Phoenix, Arizona, 85012; PETER D. BAIRD, ESQ., First National Bank Plaza, One Hundred West Washington Street, Phoenix, Arizona, 85003; ARTHUR L. HIRSCH, ESQ., 805 Transamerica Building, Tucson, Arizona, 85701; ALBERT R. VERMEIRE, ESQ., 3443 North Central, Suite 1510, Phoenix, Arizona, 85012; GILBERT F. DIEKMANN, ESQ., Bank of America Center, 555 California Street, San Francisco, California, 94104; RONALD J. COHEN, ESQ., 2100 First National Bank Plaza, Phoenix, Arizona, 85003; JOHN C. GAGE, ESQ., 1000 Bryant Building, Kansas City, Missouri, 64106; RICHARD BEN-VENISTE, ESQ., 1801 K Street, N.W., Washington, D. C., 20006.

Bruce E. Miller
Deputy Attorney General
of Kansas

APPENDIX A

Marcus W. RANKIN, Plaintiff,

v.

Wayne HOWARD and Jane Doe Howard, his wife, Joseph Alexander, Sr. and Esther Alexander, his wife, Joseph Alexander, Jr. and Jane Doe Alexander, his wife, Michael E. Trauscht and Jane Doe Trauscht, his wife, Freedom of Thought Foundation, an Arizona Corporation, William J. Rankin and Wilma E. Rankin, his wife, James J. Zeller, S. Mitchell Mack, Jr. and Jane Doe Mack, his wife, Gary Scharff and Jane Doe Scharff, his wife, Steve Lotz and Jane Doe Lotz, his wife, Gary Conklin and Jane Doe Conklin, his wife, and Lawrence Gumbriner and Jane Doe Gumbriner, his wife, Defendants.

Civ. No. 77-790 PHX-CAM.

United States District Court, D. Arizona.

July 7, 1978.

Civil rights action was brought for alleged interference with plaintiff's religious beliefs and practices, and for common-law torts. On motion of certain defendants for summary judgment or partial summary judgment, the District Court, Muecke, J., held that: (1) where probate judge had statutory authority to create guardianships over persons within the county and application for guardianship stated that proposed ward was a resident of the county, later discovery that the proposed ward was in fact not a resident of the county but would not support a finding that the judge acted in clear absence of all jurisdiction so as to defeat judicial immunity, even if it were shown that judge knew that proposed ward was not living in the county at the time guardianship order was issued; (2) since judge was immune and the officers carrying out his order were also immune, other defendants were not acting under color of state law for purposes of civil rights statute proscribing acting under color of state law or authority to deprive person of rights, privileges or immunities, but (3) allegations that purpose of private defendants was to interfere with the practice of plaintiff's religion and that pursuant to ex parte guardianship order obtained plaintiff was transported to another state while in custody of defendants, where he was "counseled" by certain persons, stated cause of action under civil rights conspiracy statute.

Motion of defendant judge for summary judgment granted; motion of other defendants for partial summary judgment granted in part and denied in part.

1. Conspiracy ⇐7.7

If state actors are immune from prosecution, this will negate claims against alleged coconspirators under civil rights statute which requires showing that defendants acted under color of state law or authority. 42 U.S.C.A. § 1983.

2. Judges ⇐36

It is not necessary to find personal jurisdiction over plaintiff in order to find judicial immunity with respect to judge's acts concerning a plaintiff, provided that judge did not act in the clear absence of all jurisdiction.

3. Judges ⇐36

Where probate judge had statutory authority to create guardianships over persons within the county and application for guardianship stated that proposed ward was a resident of the county, later discovery that the proposed ward was in fact not a resident of the county might support a finding that order entered in the proceeding was in excess of jurisdiction but would not support a finding that the judge acted in clear absence of all jurisdiction so as to defeat judicial immunity, even if it were shown that judge knew that proposed ward was not living in the county at the time guardianship order was issued.

4. Judges ⇐36

Any immunity which judge had with respect to guardianship order also attached to officers carrying out that order.

5. Civil Rights ⇐13.5(4)

Where probate judge in issuing guardianship order and any officers carrying out that order were immune from suit, private defendants who secured the order were not acting under color of state law for purposes of civil rights statute. 42 U.S.C.A. § 1983.

6. Conspiracy ⇐7.7

State action is not an element of actions brought under statutes proscribing conspiracy to interfere with civil rights and neglecting to prevent such wrong; rather, the elements of a suit thereunder are: (1) conspiracy to go in disguise on the highways or on the premises of another; (2) for the purpose of depriving a person or class of persons of the equal protection of the laws or equal privileges and immunities under the laws; (3) an overt act in the furtherance of the conspiracy resulting in; (4) injury to the person or property or deprivation of any of the rights or privileges of a citizen. 42 U.S.C.A. §§ 1985, 1986.

7. Conspiracy ⇐18

Allegation that defendants were members of a certain foundation and that it was their purpose to interfere with the practice of plaintiff's religion and his church alleged a class-based animus within scope of civil rights statute; but, since no racial class was alleged, the Thirteenth Amendment could not be relied on as a source of congressional power to reach the private conspiracy alleged. 42 U.S.C.A. § 1985; U.S.C.A.Const. Amend. 13, § 2.

8. Conspiracy ⇐18

Complaint alleging that private defendants conspired to coerce plaintiff into renouncing his religious affiliation with church and to prevent him from freely associating with other members of the church and practicing his religious belief and pursuant thereto secured ex parte guardianship order pursuant to which plaintiff was taken into custody and transported to another state where he was "counseled" by certain persons stated cause of action against private defendants under civil rights statute proscribing conspiracy to interfere with civil rights. 42 U.S.C.A. §§ 1985, 1986.

Peter D. Baird, Lewis & Roca, Phoenix, Ariz., Richard Ben-Veniste, Meirod, Redman & Gartlan, Washington, D. C., for plaintiff.

Gilmore F. Dickmann, Jr., Bronson, Bronson & McKinnon, San Francisco, Cal., Monbleau, Vermeire & Turley, Ronald Jay Cohen, Streich, Lang, Weeks, Cardon & French, Phoenix, Ariz., John C. Gage, Gage & Tucker, Kansas City, Mo., for defendants Rankin.

David J. Karasek, Robinson, Karasek & Hendrickson, Phoenix, Ariz., for defendants Conklin.

Arthur L. Hirsch, Tucson, Ariz., for defendants Scharff, Freedom of Thought Foundation, Joseph Alexander and Esther Alexander.

Gary Conklin, pro se, Westmoreland, Kan.

Wayne Howard, pro se.

OPINION and ORDER

MUECKE, District Judge.

This matter is before this Court on the motion for partial summary judgment of Defendants Howard and Trauscht and the motion for summary judgment of Defendant Judge James Zeller. The matter has been well briefed including supplemental briefs subsequent to the hearing, and the matter was orally argued before the Court on April 24, 1978. As discussed below, the Court finds that Defendant Zeller's motion for summary judgment is granted, and the motion for partial summary judgment of Defendants Howard and Trauscht is granted in part and denied in part.

At the time of the events giving rise to this complaint, plaintiff was an adult member of the Unification Church. Defendants Howard and Trauscht were attorneys acting on behalf of the Freedom of Thought Foundation (Foundation). Plaintiff alleges in his complaint that the defendants were members of a conspiracy to coerce plaintiff into renouncing his religious affiliation with the church, to prevent plaintiff from freely associating with other members of the

church, to prevent plaintiff from freely discussing and practising his religious beliefs, and to prevent plaintiff from traveling among and between the several states.

To carry out this conspiracy plaintiff alleges that it was defendants' intention to arrange with Defendant Judge Zeller to create an ex parte guardianship so that defendants could take custody of plaintiff and "deprogram" him. For this purpose, plaintiff alleges that Defendant Judge Zeller was also a member of the conspiracy.

Plaintiff further alleges that the Foundation coordinated the activities of the other defendants and made its resources available to the defendants.

Briefly stated the facts are that arrangements were made with Defendant Judge Zeller, a probate judge of Pottawatamie, Kansas, for him to hold an ex parte guardianship hearing on December 25, 1977. On that date, certain of defendants appeared before Judge Zeller and presented an application for the appointment of a guardianship for the plaintiff. The application stated that plaintiff was living within the County of Pottawatamie, Kansas, and an affidavit filed by the parents of the plaintiff also stated that plaintiff was a resident of that county.

On the basis of the application presented to Judge Zeller, he signed an order appointing plaintiff's father as temporary guardian of plaintiff and authorizing the guardian to take the proposed ward into personal custody and have him counseled, examined, and treated by persons (including lay persons), and directing any law enforcement officer in the state to assist the father in the location and assumption of custody over the proposed ward.

Plaintiff was in fact not within the county at the time the order was signed, nor was he a resident of that county. He was flown into the county later that day by his father at which time he was taken into custody pursuant to the guardianship order.

After plaintiff was taken into custody, he was transported to Kansas City International Airport and then to Phoenix, Arizona, where he was "counseled" by certain persons.

Plaintiff subsequently escaped from custody and has filed this suit. The complaint alleges nine claims for relief. The first is for violation of the Civil Rights Act, 42 U.S.C. § 1983; the second is for violation of the Civil Rights Act, 42 U.S.C. §§ 1985 and 1986; and the remaining claims are for common law torts.

Defendant Judge Zeller has moved for summary judgment, and Defendants Howard and Trauscht have moved for partial summary judgment as to the claims under the Civil Rights Act, §§ 1983, 1985, and 1986.

SECTION 1983

It is well recognized that in order to frame a cause of action under 42 U.S.C. § 1983, plaintiff must allege facts which show that defendants acted under color of state law or authority and have deprived the plaintiff of a right, privilege or immunity secured by the Constitution and laws of the United States. *Sykes v. California*, 497 F.2d 197 (9th Cir. 1974); *Cohen v. Norris*, 300 F.2d 29 (9th Cir. 1962). Failing in his burden of showing state action, summary judgment must be granted to defendants as to the § 1983 cause of action.

Plaintiff urges two grounds for finding state action here. The first, and the most crucial, is the action of Judge Zeller. The action of the judge in issuing the guardianship order and the actions that ensued pursuant to that order would constitute the necessary state action, provided that the judge is not immune from prosecution.

[1] It is clearly the law of this Circuit at this time that if the state actors are immune from prosecution, this will negate the claims against co-conspirators. *Sykes v. State of California*, *supra*. Plaintiff argues that this Court should not follow that decision in light of the Supreme Court's footnote in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), comparing the decisions of two conflicting circuits. There is, however, no indica on that

either of those decisions is incorrect and the court clearly declines to decide the issue. This Court is bound to follow the law of this Circuit until such time that the Circuit or the Supreme Court interprets the law to be otherwise.

Thus, if Judge Zeller's action in issuing the guardianship order was protected by judicial immunity, the § 1983 claims against all other defendants will also fall.

[2] Plaintiff has argued that in order to find judicial immunity, the judge must have acted with both personal jurisdiction as well as subject matter jurisdiction. That is simply not in conformity with the holding of *Stump v. Sparkman, supra.* The court said, quoting from *Bradley v. Fisher,* 13 Wall. 335, 20 L.Ed. 646 (1872), "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the '*clear absence of all jurisdiction.*'" (emphasis added) 435 U.S. 349, 356, 98 S.Ct. 1099, 1105. It is therefore not necessary to find personal jurisdiction over the plaintiff in order to find judicial immunity for Judge Zeller.

[3] That Kansas statutes give a probate judge in Kansas the authority to create guardianships over persons with the county is not in dispute. The application for guardianship and the affidavit of the parents stated that plaintiff was a resident of the county. In addition, the judge inquired of counsel at the time of issuing the order as to his jurisdiction and was assured that he had that jurisdiction. A later discovery that plaintiff was in fact not a resident of the county may support a finding that the order was in excess of jurisdiction, but would not support a finding that the judge "acted in the clear absence of all jurisdiction."

Plaintiff cites cases which could be read to show that the judge acted in excess of his jurisdiction here because the proposed ward was not living within the county at the time. As the Court in *Stump* reiterated, "a [clear] distinction must be [made] between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter." (Footnote 6 at 356, 98 S.Ct. at 1104). Without ruling on whether Judge Zeller acted in excess of his jurisdiction, even assuming he had so acted, that would still be an entirely different matter than acting in the clear absence of all jurisdiction. The judge was given the statutory authority to create guardianships and the later discovery of lack of residency is not enough to defeat judicial immunity under the standards set forth in *Stump v. Sparkman, supra.*

Plaintiff's argument that the judge knew at the time he issued the guardianship order that plaintiff was not living within the county is not adequately supported by evidence presented by plaintiff. However, even if it were, it would not defeat the immunity. Again, as the court in *Stump* quoted from *Bradley v. Fischer, supra,* "[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 435 U.S. 349, 355, 98 S.Ct. 1099, 1104.

[4] Plaintiff secondly argues that even if the judge is immune from suit here, the actions of the guardian and the various officers in enforcing the guardianship decree will serve as state action for purposes of the civil rights act. These persons were acting, however, to carry out a direct order of the court and were therefore acting as officers of the court. As such, any immunity which the court has with respect to that order also attached to the officers carrying out that order. *Holmes v. Silver Cross Hospital,* 340 F.Supp. 125 (N.D.Ill.1972); *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno,* 547 F.2d 1 (1st Cir. 1976); and *Burkes v. Callion,* 433 F.2d 318 (9th Cir. 1970).

Having found that Judge Zeller is immune from suit, Judge Zeller's motion for summary judgment must be granted.

[5] In addition, having found that the judge is immune, and any officers carrying out the order, and the guardian acting pursuant to that order, are also protected by the court's immunity, the other defendants in this action were not acting under color of state law. The motion of Defendants Howard and Trauscht for partial summary judgment must therefore be granted with respect to the § 1983 claim.

SECTIONS 1985 and 1986

[6] State action is not an element in actions brought under 42 U.S.C. §§ 1985 and 1986. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). *Griffin* has established the elements that must be present for suit under these sections, though. They are as follows: (1) a conspiracy to go in disguise on the highway or on the premises of another; (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy resulting in; (4) injury to the person or to property or deprivation of any of the rights or privileges of a citizen.

The complaint here satisfies the requirements of (1), (3) and (4). The element that is in dispute here, and that which has been the center of discussion in other cases dealing with § 1985 conspiracies, is element (2). Giving this element the construction of *Griffin*, the question can be most simply stated as whether a religious group may be deemed a class for purposes of § 1985.

Griffin requires a class-based, invidiously discriminatory animus in order for an action to lie under this section. In attempting to interpret this requirement, the courts have heeded *Griffin*'s caution that § 1985 is not meant to be a federal tort law. In *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) the court concluded that an arbitrary discrimination against attorneys who practiced criminal law did not deprive the plaintiff attorney of equal protection of the law.

In *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975) the court held that a complaint alleging that defendants had discriminated in hiring against citizens failed to state a claim under § 1985.

In *Arnold v. Tiffany*, 487 F.2d 216 (9th Cir. 1973), the court found that a group of seventeen independent newspaper distributors was not the type of class the court had in mind in *Griffin* and that § 1985 sought to protect.

In *Western Telecasters, Inc. v. California Federation of Labor, AFL–CIO*, 415 F.Supp. 30 (S.D.Cal.1976), the court held that alleged discrimination by a union against employees of a non-union entity without any invidiously discriminatory animus was not actionable under § 1985.

Each of these decisions was dealing with purported classes, however, none of them dealt with race as in *Griffin*, or religion as here. There have been no cases cited to this Court, or has this Court been able to find any, where the class asserted is a religious class, and the Court has refused to accept jurisdiction under § 1985. In some cases, the courts have held that the class presented was not within those protected by *Griffin* and gone on to mention that the class was not based on race or religion. *Western Telecasters, Inc. v. California Federation of Labor, AFL–CIO, supra; Arnold v. Tiffany, supra.* Other cases dealing with religion have specifically held that a religion based class is a class protected by § 1985. *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971); *Baer v. Baer*, 450 F.Supp. 481 (N.D.Cal.1978).

[7] *Baer* is a case very similar to that before this Court. In that case, the complaint alleged that a group was attempting to interfere with the religious practices of plaintiff and plaintiff's church. That is similar to the allegations contained in the complaint in the case before this Court. Plaintiffs have alleged that the Defendants Howard and Trauscht are members of the Foundation and it is their purpose to interfere with the practice of plaintiff's religion and his church. The court in *Baer* found this to be a class based animus and this Court agrees with that conclusion. See also

Action v. Gannon, supra, and *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973).

This brings us to the other requirement that *Griffin* has established for a cause of action under § 1985, namely, the identity of a source of congressional power to reach the private conspiracy alleged. *Griffin v. Breckenridge*, 403 U.S. at 104, 91 S.Ct. 1790. In *Griffin*, the court found two sources of power to reach the conspiracy: § 2 of the Thirteenth Amendment and the right of interstate travel. The former is not an element in this case as there is no racial class alleged.

However, the second ground for congressional power stated in *Griffin* is clearly present in this case—right to interstate travel. There is no dispute in the facts that plaintiff was taken to Phoenix, Arizona, while in custody of defendants.

[8] In *Baer v. Baer*, *supra*, the court noted that while the class alleged satisfied the requirements of *Griffin*, there was no source of congressional power present since there had been no interstate travel. That is not true in the present case and this Court will follow the reasoning in *Baer* and find that all the requirements of § 1985 as interpreted by *Griffin* are satisfied in this case.

It should be emphasized that every case which has dealt with a religious class has found that it is the type of class protected by § 1985. In addition, other cases not dealing with religious classes have stated in dicta that such a class would come within the statute. The only case that has found a religious class existed but has also held that there was no jurisdiction under § 1985 is the *Baer* case, and in that case the court noted that the fatal flaw was the lack of specific congressional power to act, such as protection of the right to interstate travel. That element that was missing in *Baer* is present in the case before this Court.

Having found that plaintiff has alleged a class based, invidiously discriminatory animus, and there is congressional power to prohibit such discrimination through the right to interstate travel, it follows that plaintiff has stated a cause of action against Defendants Howard and Trauscht under §§ 1985 and 1986. Defendants Howard and Trauscht's motion for partial summary judgment must therefore be denied on this issue.

IT IS THEREFORE ORDERED that Defendant Judge Zeller's motion for summary judgment is granted.

IT IS FURTHER ORDERED that Defendants Howard and Trauscht's motion for partial summary judgment is granted as to the first claim for relief (§ 1985) and denied as to the second claim for relief (§§ 1985(3), 1986(3)), and 1986).

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCUS W. RANKIN, Plaintiff-Appellant, v. WAYNE HOWARD and JANE DOE HOWARD, his wife; JOSEPH ALEXANDER, SR. and ESTHER ALEXANDER, his wife, et al., Defendants-Appellees.	)	No. 78-3216 [D.Ct. CV 77-790] OPINION

On Appeal from the United States District Court
For the District of Arizona
Carl A. Muecke, District Judge, Presiding

[Argued September 8, 1980
Submitted September 22, 1980]

Before: WRIGHT and FERGUSON, Circuit Judges, and BROWN, Senior District Judge.*

EUGENE A. WRIGHT, Circuit Judge:

The parents of 22 year old Marcus Rankin, a member of the Unification Church, sought to have him "deprogrammed."[1/] They retained Howard, an Arizona lawyer, to institute a guardianship proceeding.

Howard filed a petition for guardianship with Judge Zeller, a nonlawyer probate judge in Pottawatomie County, Kansas. The petition falsely recited that Rankin was a resident of Pottawatomie County. Actually, he lived in Missouri.

On Christmas 1976, while Rankin was at home in Missouri, guardianship papers were issued ex parte by the Kansas judge. Young Rankin was then flown to Kansas in his father's plane for what he thought would be a social visit.

*Of the District of Kansas

On arrival he was taken into custody and flown to Arizona. There he was confined to a motel room for "deprogramming," in which Trauscht, another lawyer, allegedly participated. He escaped after nine days.

Rankin sued his parents, [2] Judge Zeller, Howard, Trauscht, and others, alleging a conspiracy to deprive him of civil rights in violation of 42 U.S.C. §§ 1983, 1985, and 1986 and common-law torts.

He charged that the judge privately agreed with the others before the petition was filed to order the guardianship, knew that the jurisdictional allegations were fraudulent, and violated a jurisdictional requirement of the Kansas guardianship statute as well as the United States Constitution by failing to give the proposed ward notice or an opportunity to be heard. See K.S.A. §§ 59-3012 to -3013 (prior to 1977 amendments); In re Wellman, 3 Kan.App. 100, 45 P. 726, 727 (1896).[3]

The district court granted summary judgment for Judge Zeller on all claims, finding him absolutely immune. Rankin v. Howard, 457 F. Supp. 70, 73 (D. Ariz. 1978). The court granted partial summary judgment for Howard and Trauscht on the § 1983 claim. Id. at 74.[4]

Rankin contends that, because Judge Zeller acted nonjudicially and in the clear absence of personal jurisdiction, he lost his judicial immunity.[5] Rankin also asserts error in the holding that the other defendants were insulated from § 1983 liability by derivative immunity.

We invited the parties to submit supplemental briefs on the threshold question whether this appeal was interlocutory in view of the fact that the plaintiff's

claims under §§ 1985 and 1986 and under state tort law remain to be adjudicated. We now are satisfied that the district court made the required determination in entering final judgments pursuant to Federal Rule of Civil Procedure 54(b) and that it did not abuse its discretion in doing so.[6/]

I.

We consider first the contention that Judge Zeller lost his immunity by acting nonjudicially and in the clear absence of personal jurisdiction.

In Stump v. Sparkman, 435 U.S. 349 (1978), the Supreme Court declared that state judges are immune from § 1983 liability for "judicial" acts not taken "in the 'clear absence of all jurisdiction.'" Id. at 357 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)). A state judge who ordered the sterilization of a minor at her mother's request was held immune because the order was a judicial act and no state law clearly excluded petitions for sterilization from the court's subject matter jurisdiction. 435 U.S. at 357, 360.[7/]

A. The Nonjudicial Agreement

The Stump Court identified two specific factors to be considered in determining whether an act is "judicial": "the nature of the act iself, i.e., whether it is a function normally performed by a judge, and . . . the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." 435 U.S. at 362. We also consider the underlying purpose of judicial immunity. Gregory v. Thompson, 500 F.2d 59, 63 (9th Cir. 1974).[8/]

Although a party conniving with a judge to predetermine the outcome of a judicial proceeding may deal with him in his "judicial capacity," the other party's expectation, i.e., judicial impartiality, is actively frustrated by the scheme. In any event, the agreement is not "a function normally performed by a judge." It is the antithesis of the "principled and fearless decision-making" that judicial immunity exists to protect. See Pierson v. Ray, 386 U.S. 547, 554 (1967); Gregory v. Thompson, 500 F.2d at 63.

Rankin alleged that Judge Zeller agreed in advance with the others to rule favorably on the petition. We conclude that a judge's private, prior agreement to decide in favor of one party is not a judicial act. See also Lopez v. Vanderwater, 620 F.2d 1229, 1235-37 (7th Cir. 1980) (judge not immune for "prosecutorial" acts prior to biased decision).[9] If the alleged agreement manifests Judge Zeller's participation in a conspiracy, then proof of the agreement could form the basis of liability whether or not he is immune from liability for subsequent judicial acts.

B. The Clear Absence of Personal Jurisidiction

Although the Supreme Court acknowledged in Stump v. Sparkman that Judge Stump may have committed "grave procedural errors," 435 U.S. at 359, it did not explicitly consider whether he acted in the clear absence of personal jurisdiction or whether such action would be protected by judicial immunity.[10] The question appears to be one of first impression.

It is not sufficient that the court in fact lacked jurisdiction. Because jurisdictional issues are often difficult to resolve, judges are entitled to decide such issues without fear of reprisal should they exceed the precise limits of their authority. Stump v. Sparkman, 534 U.S. at 356. Judges of courts of general jurisdiction are not liable for judicial acts merely "in excess of their jurisdiction," even when the acts "are alleged to have been done maliciously or corruptly." Id. (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) at 347).

But when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost. See Bradley v. Fisher, 80 U.S. (13 Wall.) at 351 ("when the want of jurisdiction is known to the judge, no excuse is permissible"); Turner v. Raynes, 611 F.2d 92, 95 (5th Cir. 1980) (Stump is consistent with the view that "a clearly inordinate exercise of unconferred jurisdiction by a judge--one so crass as to establish that he embarked on it either knowingly or recklessly--subjects him to personal liability").14/

If, as alleged, Judge Zeller knew the jurisdictional allegations to be fraudulent, or if valid Kansas statutes expressly foreclosed personal jurisdiction over a proposed ward in ex parte proceedings for temporary guardianship, then the judge acted in the clear and complete absence of personal jurisdiction. If his acts were part of a conspiracy, he is properly held responsible for the consequences.

The district court here assumed that a court arguably having subject matter jurisdiction does not act in the "clear absence of all jurisdiction." When the Supreme Court first formulated the "clear absence" standard, however, it stated that the principle of immunity applied when there was "jurisdiction of both subject and person." Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 352 (1872).[11/]

An absence of personal jurisdiction may be said to destroy "all jurisdiction" because the requirements of subject matter and personal jurisdiction are conjunctional.[12/] Both must be met before a court has authority to adjudicate the rights of parties to a dispute.

If a court lacks jurisdiction over a party, then it lacks "all jurisdiction" to adjudicate that party's rights, whether or not the subject matter is properly before it. See, e.g., Kulko v. Superior Court, 436 U.S. 84, 91 (1978) ("[i]t has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant") (citations omitted); In re Wellman, 3 Kan. App. 100, 45 P. 726, 727 (1896) (ex parte guardianship proceeding would be a "flagrant violation" of due process, rendering any order null and void).[13/]

Because the limits of personal jurisdiction constrain judicial authority, acts taken in the absence of personal jurisdiction do not fall within the scope of legitimate decisionmaking that judicial immunity is designed to protect. See Gregory v. Thompson, 500 F.2d at 63. We conclude that a judge who acts in the clear and complete absence of personal jurisdiction loses his judicial immunity.

C. The Need for Further Inquiry

Rankin's allegations, which draw some support from affidavits and answers to interrogatories assembled during discovery proceedings, raise material issues of fact that were not fully considered by the district court. Summary judgment was inappropriate.[15/]

Further discovery may resolve the issues, and trial is not necessarily required. But the district court must consider the possibility that Judge Zeller lost his immunity by participating in a conspiracy to violate Rankin's civil rights through a nonjudicial agreement or a judicial act in the clear and complete absence of personal jurisdiction.

The judgment of the district court dismissing all claims against Judge Zeller is reversed and remanded for further proceedings consistent with this opinion.

II.

The § 1983 action against Howard and Trauscht was dismissed because of Judge Zeller's supposed immunity. The district court relied on our decision in Sykes v. California, 497 F.2d 197 (9th Cir. 1974), for the proposition that an immune state official's coconspirators are derivatively immune because they do not act under color of state law. Id. at 202.

In later cases, we acknowledged that the "status of derivative immunity [was] unclear in this circuit." Aldabe v. Aldabe, 616 F.2d 1089, 1092 n.2 (9th Cir. 1980) (per curiam) (citing Briley v. California, 564 F.2d 849, 858 n. 10 (9th Cir. 1977)).

The Supreme Court resolved the issue in Dennis v. Sparks, -- U.S. -- (Nov. 17, 1980). The Court held that an immune judge's private coconspirators do not enjoy derivative immunity. Slip op. at 3.

The Court observed that "[i]mmunity does not change the character of the judge's action or that of his co-conspirators. Indeed, his immunity is dependent on the challenged conduct being an official act within his statutory jurisdiction, broadly construed." Id. at 4 (footnote and citations omitted).

It follows that "[p]rivate parties who corruptly conspire with a judge in connection with such conduct are . . . acting under color of state law within the meaning of § 1983." Id. at 5. Even if further proceedings establish Judge Zeller's immunity, Howard and Trauscht thus may be held liable.

In any event, Rankin must prove that there was a conspiracy involving state action to deprive him of rights secured by the Constitution or federal laws. Aldabe v. Aldabe, 616 F.2d at 1092.

It is not sufficient that the defendants carried out a judicial order. See Dennis v. Sparks, slip op. at 4. Rankin must demonstrate that they "reached an understanding" with Judge Zeller to violate Rankin's rights under color of the guardianship proceeding. Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); see Dennis v. Sparks, slip op. at 3.

He has made some showing that they may have induced the judge to abandon his impartiality and fraudulently alleged Rankin's residence in Kansas to create a semblance of jurisdiction. Because these allegations and the supporting materials [16/] raise material issues of fact, we reverse and remand the partial summary judgment that dismissed the § 1983 claim against Howard and Trauscht.

Reversed and remanded.

FOOTNOTES

1/ Most basic facts are not in dispute. Discovery yielded some conflicting accounts. Whether Judge Zeller agreed in advance to rule favorably on the petition and whether he knew that Rankin was not residing or present in Kansas is unclear.

In reviewing summary judgments against Rankin, we view the materials "in the light most favorable" to him. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

2/ Rankin has now settled with his parents.

3/ The Wellman court stated: "Without [notice and a hearing], no citizen would be safe from the machinations of secret tribunals, and the most sane members of the community might be adjudged insane and landed in the madhouse." 45 P. at 727.

4/ After the district court granted the summary judgments, the plaintiff filed an amended complaint, which for the first time invoked the court's diversity jurisdiction to present claims based entirely on Kansas law. We do not consider questions raised by the amended complaint.

5/ Rankin also contends on appeal that Judge Zeller acted in the absence of subject matter jurisdiction. Zeller was a probate judge, and at the time in question Kansas law granted exclusive jurisdiction of guardianship proceedings to probate judges. K.S.A. § 59-3005 (prior to 1977 amendments). Judge Zeller had at least a semblance of subject matter jurisdiction.

6/ Pursuant to Rule 54(b), the district court determined that there was no just reason for delay in the entry of final judgment on the claims involved and directed the clerk to enter final judgments.

7/ The 5-3 decision has been criticized. See Rosenberg, Stump v. Sparkman: The Doctrine of Judicial Impunity, 64 Va. L. Rev. 833, 836 (1978) ("Stump is a possible invitation to judicial lawlessness").

8/ The Stump majority emphasized behavioral factors in defining a judicial act. Justice Stewart, in dissent, suggested a purely conceptual approach: "the concept of what is a judicial act must take its content from a consideration of the factors that support immunity from liability for the performance of such an act." 435 U.S. at 368.

Although Justice Stewart's approach may not have been adopted by the Court, we do not believe that the majority meant to deny the relevance of the doctrine's purpose in determining its scope.

9/ In Sparks v. Duval County Ranch Co., Inc., 604 F.2d 976 (5th Cir. 1979) (en banc), aff'd sub nom. Dennis v. Sparks, -- U.S. -- (Nov. 17, 1980), the Fifth Circuit held that a judge accused of accepting a bribe to enter an injunction was "unqualifiedly immune from suit for damages occasioned by his judicial act." 604 F.2d at 978.

The Supreme Court granted certiorari on the issue of derivative immunity, 445 U.S. 942 (1980), but denied certiorari on the issue of judicial immunity. 445 U.S. 943 (1980).

Nevertheless, in affirming the Fifth Circuit's rejection of derivative immunity, the Court remarked:

> The courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on immunity grounds.

Slip op. at 3 (emphasis added).

We do not believe that this dictum forecloses our approach to the present case. The Fifth Circuit focused only on "damages occasioned by [the judge's] judicial act." 604 F.2d at 978. It apparently did not consider, as we do here, the nonjudicial character of the prior agreement. "[A]s the case [came] to" the Supreme Court, only a judicial act had been addressed by "[t]he courts below."

9/ (continued)

In reviewing the conduct of the judge's alleged co-conspirators, the Dennis Court noted the absence of any claim that the private parties were performing judicial acts. The Court remarked: "Not surprisingly, petitioner does not argue that judges must conspire with private parties in order that judicial duties may be properly accomplished." Slip op. at 5-6.

Likewise, we have little difficulty concluding that a judge's private, prior agreement to decide favorably to one party is not the way to preserve the judge's "free[dom] to act upon his own convictions." See Bradley v. Fisher, 80 U.S. (13 Wall.) at 347.

10/ See Rosenberg, supra note 7, at 849 (procedural defects in Stump "were not deemed germane to the crucial jurisdictional determination").

The Court did say that "the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him." Stump v. Sparkman, 435 U.S. at 356. This might imply that subject matter jurisdiction is sufficient to confer immunity, but it was said in the apparent absence of a specific challenge to personal jurisdiction.

Further, the statement did not purport to exhaust the bases on which immunity could be overcome. It did not, for example, mention the requirement that the "challenged action" be "judicial" in character. This requirement was discussed later in the opinion. See id. at 360-64. Although the language of Stump is broad, we cannot infer that the Court there decided an issue it did not explicitly consider.

11/ Several courts have repeated this language, indicating in dicta that both subject matter and personal jurisdiction are necessary to confer judicial immunity. See, e.g., Duba v. McIntyre, 501 F.2d 590, 592 (8th Cir. 1974), cert. denied, 424 U.S. 975 (1976) ("the judge must have both jurisdiction over the person and subject matter if he is to be immune from suit"); Ryan v. Scoggin, 245 F.2d 54, 58 (10th Cir. 1957) (judge is immune for order or judgment when "court has jurisdiction of the subject matter and of the parties").

12/ See Rosenberg, supra note 7, at 849-50.

"When a judge structures a controversy such that one side is necessarily precluded from presenting any evidence concerning the decision to be made, the court's actions properly can be viewed as a jurisdictional error rather than a mere error in the exercise of power."

Id. at 849.

13/ Indeed, when the limits of legitimate authority are wholly abandoned, the judge's act may cease to be "judicial." See, e.g., Lopez v. Vanderwater, 620 F.2d 1229, 1235 (7th Cir. 1980) (judge's prosecutorial acts were nonjudicial; no immunity for such acts); Gregory v. Thompson, 500 F.2d 59, 64 (9th Cir. 1974) (judge's use of physical force to evict person from courtroom was "simply not an act of a judicial nature"). Cf. Note, Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments, 87 Yale L. J. 164, 165 (1977) (at English common law proceedings in court without jurisdiction were deemed coram non judice -- "before one not a judge").

14/ In Stump, although Indiana law did not expressly grant subject matter jurisdiction over sterilization petitions, the Court found it "more significant that there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump." 435 U.S. at 358.

The implication is that, had there been Indiana law expressly prohibiting the defendant judge from exercising jurisdiction, a clear absence of jurisdiction would have been established. Here the plaintiff contends that Kansas law expressly prohibited the defendant judge from exercising jurisdiction over Rankin. If this contention is correct, the judge lost his immunity.

15/ The allegation that Judge Zeller agreed to rule favorably on the petition is supported by an affidavit from Rankin's father.

The same affidavit may also support an inference that the judge knew he lacked personal jurisdiction. In any event, Zeller's response to written interrogatories fails to resolve the issue.

15/ (continued)

Zeller recalled being told that Rankin "would be in Pottowatomie [sic] County on December 25, 1976," but "would be in the jurisdiction only temporarily." The petition for guardianship recited that Rankin resided in Pottawatomie County. At the very least, Judge Zeller, by his own admission, had serious reason to doubt the allegation on which his jurisdiction over Rankin was premised.

In view of the alleged nonjudicial connivance, together with questions surrounding personal jurisdiction under Kansas law and the judge's actual knowledge, we cannot say that Judge Zeller met his initial burden of showing "that there [was] no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970).

16/ See note 15 supra.

APPENDIX B

59-102. Definitions. As used in this act the term "probate court" means judge of the probate court when that meaning is necessary to effectuate the general purpose of the provisions of this act. As used in this act, unless the context otherwise indicates:

(1) The word "representative" includes executors, administrators, administrators with the will annexed, administrators, *de bonis non*, conservators, and guardians;

(2) the word "fiduciary" includes representatives, trustees, and surviving partners administering their trusts;

(3) the word "person," as applied to fiduciaries, includes banks and other corporations authorized by law to act in a fiduciary capacity in this state;

(4) the term "simplified administration" means administration under the Kansas simplified estates act, as contained in K. S. A. 1975 Supp. 59-3201 to 59-3206, inclusive;

(5) the term "supervised administration" means administration under the Kansas probate code, exclusive of Kansas simplified estates act;

(6) the masculine gender includes the feminine; and

(7) the singular number includes the plural. [K. S. A. 59-102; L. 1965, ch. 348, § 1; L. 1975, ch. 299, § 1; Jan. 1, 1978.]

59-301. Courts of record; original jurisdiction. The probate courts shall be courts of record, and, within their respective counties, shall have original jurisdiction:

(1) To admit last wills and testaments to probate.

(2) To grant and revoke letters testamentary and of administration.

(3) To direct and control the official acts of executors and administrators, to settle their accounts, and to order the distribution of estates.

(4) Of partnership estates as provided in this act.

(5) To determine the heirs, devisees, and legatees of decedents.

(6) To appoint and remove guardians and conservators for minors and incapacitated persons, to make all necessary orders relating to their estates, to direct and control the official acts of such guardians, and conservators and to settle their accounts.

(7) To hear and determine cases of habeas corpus.

(8) Of trusts and powers created by wills admitted to probate, and of trusts and powers created by written instruments other than by wills in favor of persons subject to conservatorship; to appoint and remove trustees for such trusts, to make all necessary orders relating to such trust estates, to direct and control the official acts of such trustees, and to settle their accounts; but this provision shall not affect the jurisdiction of district courts in such cases.

(9) To appoint and remove trustees of estates of convicts imprisoned in the penitentiary under sentence of imprisonment for life, to make all necessary orders relating to their estates, to direct and control the official acts of such trustees, and to settle their accounts.

(10) To hold hearings respecting mentally ill persons, and to order their referral for care or treatment.

(11) Such other jurisdiction as may be given them by statutes pertaining to particular subjects.

(12) And they shall have and exercise such equitable powers as may be necessary and proper fully to hear and determine any matter properly before such courts. [K. S. A. 59-301; L. 1965, ch. 348, § 8; Jan. 1, 1968.]

Article 30.—GUARDIANS OR CONSERVATORS

Revisor's Note:

Former laws, see K. S. A. 59-1801 to 59-1813; 59-2257 to 59-2270.

Law Review and Bar Journal References:

Sections hereunder discussed in connection with new terms, definitions and procedures affecting probate code, Joe H. Swinehart, 34 J. B. A. K. 324, 325, 326 (1965).

Sections hereunder cited in discussing new philosophy underlying 1965 amendments to probate code, Robert H. Cobean, 34 J. B. A. K. 329, 364, 365, 367, 368 (1965).

Discussion of sections in this article in "Gifts to Minors: Conservatorship — Trusteeship — Custodianship," Melvin C. Peland, 5 W. L. J. 29, 32, 38, 39, 40, 43 (1965).

Mentioned in 1963-65 survey of family law, John W. Brand, Jr., and Dan Hopson, Jr., 14 K. L. R. 271, 290, 292 (1965).

Mentioned in survey of law of administration of estates, Richard C. Harris, 14 K. L. R. 139 (1965).

Detailed discussion of sections hereunder, Robert H. Cobean, 6 W. L. J. 448 to 461 (1967).

59-3001. Name and citation of act. The act shall be named and may be cited as the act for obtaining a guardian or conservator, or both. [L. 1965, ch. 347, § 1; Jan. 1, 1968.]

Law Review and Bar Journal References:

Act mentioned in "Does Kansas Need the Uniform Probate Code?," Verne M. Laing, 42 J. B. A. K. 139, 184 (1973).

59-3002. Definitions. When used in this act: (1) The term "incapacitated person" shall mean any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic narcotic drug addiction, chronic intoxication, or other cause to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning either his person or his estate.

(2) The term "guardian" shall mean any person who has been appointed by a court of competent jurisdiction to exercise control over the person of an incapacitated person or of a minor.

(3) The term "natural guardian" shall mean both the father and mother of a legitimate minor or the mother of an illegitimate minor, provided that both such parents or parent shall not have been found to be an incapacitated person or had their parental rights severed by a court of competent jurisdiction. If either parent of a legitimate minor dies, or has been found to be an incapacitated person or has had his parental rights severed by a

court of competent jurisdiction the other shall be the "natural guardian."

(4) The term "conservator" shall mean any person who has been appointed by a court of competent jurisdiction to exercise control over the estate of any person.

(5) The term "minor" shall mean any person defined by K. S. A. 38-101 as being within the period of minority.

(6) The term "proposed ward" shall mean a person for whom an application for the appointment of a guardian pursuant to section 6 [59-3006] has been filed.

(7) The term "proposed conservatee" shall mean a person for whom an application for the appointment of a conservator pursuant to section 6 [59-3006] has been filed.

(8) The term "ward" shall mean a person who has a guardian.

(9) The term "conservatee" shall mean a person who has a conservator.

(10) The various terms defined in section 2 [59-2902] of the act entitled "act for obtaining care or treatment for a mentally ill person" shall mean the same herein as they do in said act. [L. 1965, ch. 347, § 2; Jan. 1, 1966.]

Law Review and Bar Journal References:

Mentioned; a person found to be a "mentally ill" person is not automatically deemed to be an "incapacitated person," Gary D. Taylor, 10 W. L. J. 237, 245 (1971).

CASE ANNOTATIONS

1. Cited in applying statute of limitations in a medical malpractice case. Seymour v. Lofgreen, 209 K. 72, 78, 495 P. 2d 969.

2. Grandparent with visitation rights under 38-129 not entitled to notice of adoption; court without power to grant right after adoption. Browning v. Tarwater, 215 K. 501, 504, 524 P. 2d 1135.

59-3003. Natural guardian; powers and duties. Unless a guardian has been appointed for the minor, a natural guardian, or either of them, shall have the right to the custody of his or her minor child and the right to exercise control over the person of his or her minor child as provided by law. Unless a guardian or conservator has been appointed for the minor, the natural guardian of such minor has the right and duty, for the benefit of the minor, to manage, mortgage, sell or otherwise dispose of all of the personal estate vested in such minor when the total of such estate does not exceed four thousand dollars ($4,000) in value. [L. 1965, ch. 347, § 3; L. 1975, ch. 300, § 1; July 1.]

59-3004. Right to nominate guardian or conservator, or both. Any natural guardian may, by last will, nominate a conservator of only that portion of the estate of his minor children, whether born at the time of making the will or afterwards, which is devised or bequeathed by such natural guardian: *Provided*, That a surviving natural guardian may, by last will, nominate a guardian or conservator, or both, for any of his minor children, whether born at the time of making the will or afterwards. The guardian or conservator, so nominated, if a fit and proper person, shall be appointed by the probate court if it is found, during the hearing held pursuant to section 13 [59-3013], that a guardian or conservator, or both, should be appointed for the minor children of the testator. [L. 1965, ch. 347, § 4; Jan. 1, 1966.]

Law Review and Bar Journal References:

Discussed in 1963-65 survey of future interests and estate planning, James K. Logan, 14 K. L. R. 293, 295 (1965).

Mentioned in 1965-69 survey of estate planning and future interests, James K. Logan, 17 K. L. R. 455, 491 (1969).

59-3005. Exclusive jurisdiction, when. The probate court shall have exclusive jurisdiction of the appointment of a conservator. The probate court shall have exclusive jurisdiction of the appointment of a guardian except that no probate court shall have jurisdiction of the appointment of a guardian when the proposed ward is a minor and there is pending in any court of Kansas a proceeding in which the custody of or parental rights to such minor is being or may be determined. [L. 1965, ch. 347, § 5; Jan. 1, 1966.]

59-3006. Persons for whom a guardian or conservator, or both, may be appointed. The probate court having jurisdiction and venue of the proceedings may appoint:

(A) A guardian for

(1) an incapacitated person who is unable to make or communicate responsible decisions concerning his person;

(2) a minor;

(B) A conservator for

(1) an adult who has made application pursuant to section 7 [59-3007] of this act;

(2) an incapacitated person who is unable to make or communicate responsible decisions concerning his estate;

(3) a minor. [L. 1965, ch. 347, § 6; Jan. 1, 1966.]

59-3007. Voluntary application for the appointment of a conservator. Any adult person who is neither an adjudged incapacitated person nor is a proposed ward or proposed conservatee may file in the probate court of his

residence a verified application for the appointment of a conservator for the applicant. The application shall state:

(1) The name, age, residence and present address of the applicant;

(2) the reasons for the need of the appointment of the conservator;

(3) the name and address of the person to be appointed as conservator;

(4) a request that the court make a determination that there is a need for the appointment of a conservator and appoint a conservator. [L. 1965, ch. 347, § 7; Jan. 1, 1966.]

59-3008. Procedure. Upon the filing of the application provided for in section 7 [59-3007], the court shall issue an order fixing the time and place of the hearing on the application, which hearing may be forthwith and with or without notice as the court shall direct. If upon the hearing the court finds that it is in the best interest of the applicant that a conservator be appointed for such applicant, the court shall, upon the filing of an oath according to law and of a bond, in such an amount as the court may direct, issue letters of convervatorship to the person named in the application, if a fit and proper person. If the conservator dies, resigns or is removed, the court, after such notice to the conservatee as the court shall direct, may appoint a successor. [L. 1965, ch. 347, § 8; Jan. 1, 1966.]

59-3009. Application for appointment of guardian or conservator; contents; authenticated transcript of proposed conservatee adjudged incapacitated, insane or incompetent in another state. Any person may file in the probate court of the county of the residence or presence of the proposed ward a verified application for the appointment of a guardian. Any person may file in the probate court of the county of the residence of the proposed conservatee a verified application for the appointment of a conservator. If the proposed conservatee resides without the state, such application may be filed in any county in which any of the property of the proposed conservatee is situated.

(A) If the proposed ward or proposed conservatee is alleged to be an incapacitated person the application shall state:

(1) The applicant's belief that the proposed ward or proposed conservatee is an incapacitated person;

(2) the name, age, residence and present address of the proposed ward or proposed conservatee, if known to the applicant;

(3) the name and address of the nearest relatives of the proposed ward or proposed conservatee, if known to the applicant and if not known, that he has made diligent inquiry to learn the name of such relatives;

(4) the general character and probable value of the real and personal property, including the amount and sources of income, of the proposed ward or proposed conservatee, if known to the applicant;

(5) the name and address of the person, if any, having custody and control of the proposed ward or proposed conservatee, if known to the applicant;

(6) the names and addresses of witnesses by whom the truth of the application may be proved;

(7) the reasons for the need of the appointment of a guardian or conservator, or both;

(8) a request that the court make a determination that the proposed ward or proposed conservatee is an incapacitated person; make one or more of the orders provided for in K. S. A. 1965 Supp. 59-3010, as amended, and K. S. A. 1965 Supp. 59-3011 and acts amendatory thereof; and appoint a guardian or conservator, or both;

(9) the name, address, and relationship to the proposed ward or proposed conservatee, if any, of the person whom the court is requested to appoint as a guardian or as a conservator. Any such application may be accompanied, or the court may require that such application be accompanied by a statement in writing of a physician stating that he has examined the proposed ward or proposed conservatee and the results of the examination on the issue of whether the proposed ward or proposed conservatee is an incapacitated person or the court may allow such application to be accompanied by a verified statement by the applicant that the proposed ward or proposed conservatee has refused to submit to an examination by a physician.

(B) If the proposed ward or proposed conservatee is alleged to be a minor the application shall state:

(1) The proposed ward or proposed conservatee is a minor;

(2) the name, age, residence and present address of the proposed ward or proposed conservatee, if known to the applicant;

(3) the name and address of the natural guardian, guardian, conservator and custodian, if any, of the proposed ward or proposed conservatee, if known to the applicant, and if not known that he has made diligent inquiry to learn their names;

(4) the general character and probable

value of the real and personal property, including the amount and sources of income, of the proposed ward or proposed conservatee, if known to the applicant;

(5) the names and addresses of witnesses by whom the truth of the application may be proved;

(6) the reasons for the need for the appointment of a guardian or conservator, or both;

(7) a request that the court make a determination that the proposed ward or proposed conservatee is a minor; make one or more of the orders provided for by K. S. A. 1965 Supp. 59-3010, as amended, and K. S. A. 1965 Supp. 59-3011 and acts amendatory thereof; and appoint a guardian or a conservator, or both;

(8) the name, address, and relationship to the proposed ward or proposed conservatee, if any, of the person whom the court is requested to appoint as a guardian or as a conservator.

(C) If the proposed conservatee has been duly adjudged an incapacitated person, an insane person or an incompetent person by any court of competent jurisdiction in any other state and a domiciliary conservator or guardian for the estate of such person has been appointed, a duly authenticated transcript of such adjudication and appointment shall be prima facie evidence of such incapacity and may be relied upon for the appointment of an ancillary conservator in this state; such authenticated transcript shall be attached to the application which shall state:

(1) That the proposed conservatee has been duly adjudged an incapacitated person, an insane person or an incompetent person by a court of competent jurisdiction of another state and a domiciliary conservator or guardian for his estate has been appointed, which adjudication and appointment are still in full force and effect;

(2) the name, age, residence and present address of the proposed conservatee, if known to the applicant;

(3) the name and address of the nearest relatives of the proposed conservatee, if known to the applicant and if not known, that he has made diligent inquiry to learn the name of such relatives;

(4) the location and value of Kansas property for which an ancillary conservatorship is needed;

(5) the name and address of the person, if any, having custody and control of the proposed conservatee, if known to the applicant;

(6) the reasons for the need for the appointment of an ancillary conservator;

(7) a request that the court appoint an ancillary conservator as provided in subsection (C) of K. S. A. 1965 Supp. 59-3010, as amended. [L. 1965, ch. 347, § 9; L. 1967, ch. 320, § 1; July 1.]

CASE ANNOTATIONS

1. Premature appeal from order to amend petition in conformity with this section. *In re* Austin, 200 K. 92, 93, 435 P. 2d 1.

59-3010. Mandatory preliminary orders; procedure. Upon the filing of the application provided for in K. S. A. 1965 Supp. 59-3009, as amended:

(A) When the proposed ward or proposed conservatee is alleged to be an incapacitated person, the probate court shall issue the following:

(1) An order fixing the time and place of the hearing on the application. The time designated in the order shall in no event be earlier than seven (7) days or later than fourteen (14) days after the date of the filing of the application.

(2) An order that the proposed ward or proposed conservatee appear at the time and place of the hearing unless the court enters an order that the presence of the proposed ward or proposed conservatee is injurious to his welfare.

(3) An order appointing an attorney to represent the proposed ward or proposed conservatee at all stages of the proceedings. The court shall give preference, in the appointment of the attorney, to any attorney who has represented the proposed ward or proposed conservatee in other matters if the court has knowledge of the prior relationship. The proposed ward or proposed conservatee shall have the right to engage an attorney of his own choice and, in such an event, the attorney appointed herein shall be relieved of all duties by the court.

(4) An order that the proposed ward or proposed conservatee shall appear at a time and place that is in the best interest of the proposed ward or proposed conservatee to consult with his court appointed attorney, which time shall be prior to the execution of the order for mental evaluation, if one is to be issued, unless an order of protective custody provided for in K. S. A. 1965 Supp. 59-2912, and acts amendatory thereof, has been issued and detention of the proposed ward or proposed conservatee thereunder is in a place outside the jurisdiction of the court.

(5) A notice in the manner provided for in K. S. A. 1985 Supp. 59-3012 and acts amendatory thereof.

(6) An order for mental evaluation. Such order may be served on the proposed ward or proposed conservatee at the same time or after notice is given. It shall be served in the manner provided for in K. S. A. 1985 Supp. 59-3012, and acts amendatory thereof. It shall order the proposed ward or proposed conservatee to submit himself for a mental evaluation and to undergo such evaluation at a general hospital or a psychiatric hospital, mental health clinic, private psychiatrist or physician designated by the court in the order. A state psychiatric hospital shall receive and evaluate any proposed ward or proposed conservatee ordered evaluated therein. At the time designated by the court in the order, but in no event later than three (3) days prior to the date of the hearing provided for in K.S.A. 1985 Supp. 59-3012, as amended, the examiner shall submit to the court a report, in writing, of the evaluation which report also shall be made available to counsel for the parties at least three (3) days prior to such hearing. Such report shall state that the examiner has made an examination of the proposed ward or proposed conservatee and shall state the results of the examination on the issue of whether the proposed ward or proposed conservatee is an incapacitated person. Such order shall be issued unless the court shall determine that the statement of the physician, if any, filed with the application is a sufficient evaluation.

(B) When the proposed ward or proposed conservatee is alleged to be a minor, the court shall issue an order fixing the time and place of the hearing on the application. If the application is filed on behalf of the minor by his next friend or by the natural guardian of the minor, the time of the hearing designated in the order may be forthwith and without notice, but in no event later than fourteen (14) days after the date of filing of the application. In all other cases the time designated in the order shall in no event be earlier than seven (7) days or later than (14) days after the date of the filing of the application.

(C) When the proposed conservatee has been duly adjudged an incapacitated person, an insane person or an incompetent person and a conservator or guardian of his estate has been appointed by any court of competent jurisdiction of any other state, the court, relying upon the application which incorporates the duly authenticated transcript required by subsection (C) of K. S. A. 1985 Supp. 59-3008, as amended, shall issue an order fixing the time and place of the hearing, which hearing may be forthwith and without notice. [L. 1985, ch. 347, § 10; L. 1987, ch. 320, § 2; July 1.]

59-3011. Discretionary preliminary orders; procedure. At or after the filing of the application provided for in K. S. A. 1972 Supp. 59-3009 and prior to the hearing provided for in K. S. A. 1972 Supp. 59-3013:

(A) When the proposed ward or proposed conservatee is alleged to be either an incapacitated person or a minor, the court may issue either of the following orders:

(1) An order for investigation. Such investigation may, at the direction of the court, cover the character, family relationships and past conduct of the proposed ward or proposed conservatee; whether or not the proposed ward or proposed conservatee is likely to injure himself or others; the character and past conduct of any proposed guardian or conservator; the nature and extent of the property and income of the proposed ward or proposed conservatee; and other pertinent factors. If requested by the court, the secretary of social and rehabilitation services shall make such investigation. At the direction of the court, any person, appointed by the court, may make such investigation. The person who conducts the investigation shall promptly make a report to the court, in writing, which report shall be made available to counsel for the parties at least three (3) days prior to such hearing.

(2) An order of continuance. For good cause shown, a continuance may be granted to either the applicant or the proposed ward or proposed conservatee.

(3) An order of advancement. Upon request by the proposed ward or the proposed conservatee or his attorney, the probate court may advance the date of the hearing to as early a date as is practicable.

(B) When the proposed ward or proposed conservatee is alleged to be a minor, the court may issue any of the following orders:

(1) An order of temporary custody.

(2) An order that the proposed ward or proposed conservatee appear at the time and place of the hearing.

(3) An order appointing an attorney to represent the proposed ward or proposed conservatee at all stages of the proceedings. If over fourteen (14) years of age, the proposed ward or proposed conservatee shall have the right to engage an attorney of his

own choice and, in such an event the attorney appointed herein shall be relieved of all duties by the court.

(4) A notice in the manner provided for in K. S. A. 1972 Supp. 59-3012.

(5) An order for psychological testing. Such order may be served on the proposed ward or proposed conservatee at the same time or after notice is given. It shall be served in the manner provided for in K. S. A. 1972 Supp. 59-3012. It shall order the proposed ward or proposed conservatee to submit himself for psychological tests and to undergo such tests at a mental health clinic, psychological clinic or with a psychologist or physician designated by the court in the order. The examiner shall submit to the court a report of the evaluation at the time designated by the court. [L. 1965, ch. 347, § 11; L. 1973, ch. 186, § 30; July 1.]

59-3012. Notice. The notice provided by K. S. A. 1972 Supp. 59-3010 and 59-3011 shall be given to the proposed ward or proposed conservatee named in the application, his attorney, if any, and to such other persons as the court shall direct. If the proposed ward or proposed conservatee has a spouse, natural guardian, custodian, guardian, or conservator notice shall also be given them. (1) The notice shall state:

(A) That an application has been filed, alleging that the proposed ward or proposed conservatee is either an incapacitated person or a minor and requesting that the court appoint a guardian or a conservator, or both;

(B) the time and place of the hearing and whether the proposed ward or proposed conservatee shall be present thereat;

(C) the name of the attorney, if any, appointed to represent the proposed ward or proposed conservatee at the time and place where he shall consult with such attorney;

(D) that the proposed ward, or proposed conservatee, if he is alleged to be an incapacitated person, has a right to demand a hearing before a commission or a jury.

(2) The court may order any of the following to serve the notice:

(A) the physician currently administering to the proposed ward, or proposed conservatee provided the physician consents;

(B) the head of the local mental health clinic or his designee;

(C) the county medical health officer or his designee;

(D) the director of social services or his designee;

(E) any peace officer;

(F) the attorney of the proposed conservatee.

The notice shall be served personally on the proposed ward or proposed conservatee and his attorney, if any, not less than five (5) days prior to the date of the hearing and immediate return thereof shall be made: *Provided*, That if the proposed ward or proposed conservatee may not be personally served within the state, the court may direct notice be given to him in such manner and for such a period of time as the court shall deem reasonable. Notice required to be given to any other person shall be given in such manner and for such a period of time as the court shall deem reasonable. If the proposed ward or proposed conservatee is a patient in any psychiatric hospital notice by mail shall be given to the head of the hospital. [L. 1965, ch. 347, § 12; L. 1972, ch. 219, § 1; L. 1973, ch. 186, § 31; July 1.]

59-3013. Hearing; procedure; ancillary conservator, when. The hearing shall be held at the time and place specified in the court's order, unless an advancement or a continuance has been granted, and may be consolidated with the hearing provided for in K. S. A. 1965 Supp. 59-2917 and acts and amendments thereof. The hearing shall be held to the court only, unless the court shall determine that it shall be held before a commission or a jury or unless the proposed ward or proposed conservatee shall, at least forty-eight (48) hours prior to the time of the hearing, request in writing, a hearing before a commission or a jury.

The commission, if one is ordered or requested, shall be composed of two (2) persons duly licensed to practice medicine and surgery by the state board of healing arts, which commission shall make and file a report of its findings upon which the court shall enter judgment. The court shall allow a reasonable fee per day to each commissioner for his services, which fee shall be taxed as costs.

The jury, if one is ordered or requested, shall consist of six (6) persons and shall be selected in the manner provided in K. S. A. 1965 Supp. 59-2917 and acts amendatory thereof.

The applicant and the proposed ward or proposed conservatee shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses. All persons not necessary for the conduct of the proceedings may be excluded. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure

and in a physical setting not likely to have a harmful effect on the proposed ward or proposed conservatee. The court shall receive all relevant and material evidence which may be offered, including the testimony or written findings and recommendations of the hospital, clinic, physician or psychologist who has examined or evaluated the proposed ward or proposed conservatee and the testimony and written findings and recommendations of the investigators appointed pursuant to subsection (A) (1) of K. S. A. 1965 Supp. 59-3011 and acts amendatory thereof. Such evidence shall not be privileged for the purpose of this hearing.

If the proposed conservatee has been duly adjudged an incapacitated person, an insane person or an incompetent person by any court of competent jurisdiction in any other state and a domiciliary conservator or guardian for the estate of such person has been appointed, and such facts have been established in accordance with subsection (C) of K. S. A. 1965 Supp. 59-3009, as amended, the court shall appoint a suitable ancillary conservator.

If, upon the completion of the hearing, the court finds that the proposed ward or proposed conservatee is an incapacitated person in need of a guardian or conservator, or both, or if the court finds that the proposed ward or proposed conservatee is a minor in need of a guardian or conservator, or both, the court shall appoint one or more suitable persons, who are not minors, as guardian or conservator, or both, of such incapacitated person or minor as the case may be.

If, upon the completion of the hearing, the court finds that the proposed ward or proposed conservatee is not an incapacitated person or a minor, the court shall enter such findings in the record and shall by an appropriate order terminate the proceedings. [L. 1965, ch. 347, § 13; L. 1967, ch. 320, § 3; July 1.]

59-3014. Appointment of guardian and conservator; priority of nomination; qualification. Subject to section 4 [59-3004] of this act, the court in appointing a suitable guardian or conservator shall give priority in the following order:

(1) To the nominee of a minor over the age of fourteen (14) years who is not himself an incapacitated person.

(2) To the nominee of a natural guardian.

Upon the filing of an oath according to law, letters of guardianship shall be granted. Upon the filing of a bond in such an amount as the court may direct and an oath according to law, letters of conservatorship shall be granted. If there is no property, the court may waive the filing of a bond, but if the conservator receives or becomes entitled to any property, he shall immediately file a report thereof and a bond in such amount as the court may direct: *Provided*, That if the guardian or conservator appointed is the one named by a testator under the provisions of section 4 [59-3004] and the testator has provided by his will that no bond be required of such guardian or conservator then no bond shall be required, unless the court shall otherwise direct. If either the guardian or the conservator dies, resigns, or is removed, the court, with or without notice, may appoint a successor. [L. 1965, ch. 347, § 14; Jan. 1, 1966.]

CASE ANNOTATIONS

1. Grandparent with visitation rights under 38-129 not entitled to notice of adoption; court without power to grant right after adoption. Browning v. Tarwater, 215 K. 501, 504, 524 P. 2d 1135.

59-3015. Money estate of less than two thousand dollars. All courts having control over or custody of any amount of money not exceeding two thousand dollars ($2,000), the right to which is vested in a minor, may in its discretion, without the appointment of a conservator, or the giving of bond, and notwithstanding the provisions of section 3 [59-3003] of this act, authorize the deposit thereof in a savings account of a bank or savings and loan association, payable to the conservator when appointed or to the minor upon his attaining the age of majority, or the payment thereof to any person, including the natural guardian of the minor or the minor himself. Such person shall have the right and duty, for the benefit of the minor, to manage, invest or otherwise dispose of such monies for the benefit of such minor: *Provided*, That if such minor is a conservatee, the court shall authorize the payment thereof to the conservator of such minor. [L. 1965, ch. 347, § 15; Jan. 1, 1966.]

59-3016. Change of place of hearing, when. After the application provided for in section 9 [59-3009] or section 27 [59-3027] is filed, the probate court may at any time, on its own motion or upon the written request of any person, change the place of hearing on such application:

(*a*) To the county of the residence of the proposed ward or ward;

(*b*) To the county in which the proposed ward or proposed conservatee or ward or conservatee is a patient receiving care or treatment under the authority of a psychiatric hospital;

(c) To any other county designated by the court: *Provided*, That the proposed ward or proposed conservatee or ward or conservatee has made a request for a change of hearing and the probate court finds that the proposed ward or proposed conservatee or ward or conservatee cannot obtain a fair hearing:

Provided, however, That if any proposed ward or proposed conservatee, who is alleged to be an incapacitated person, or any ward or conservatee who was found to be an incapacitated person, is in a psychiatric hospital the probate court of the county in which is located such hospital may not change the hearing under any circumstances unless the proposed ward or proposed conservatee or ward or conservatee has requested such change.

When any order changing the place of hearing is issued, the probate court issuing such order shall transmit to the probate court in which the hearing is to be held a certified copy of all pleadings and orders in the case.

Any probate court to which the hearing is changed shall proceed in the case as if the application had been originally filed therein and shall cause notice of the change of the place of the hearing to be given to the persons and in the manner provided for in section 12 [59-3012]: *Provided*, That the court need not issue the order for mental evaluation pursuant to section 10 (F) [59-3010] if such order has previously been issued and: *Provided further*, That the court shall not determine the suitability of nor appoint or discharge a guardian or conservator.

Any probate court holding such a hearing shall transmit a statement of any court costs incurred and a certified copy of all pleadings and findings of fact in the case to the probate court having venue. Upon receipt of such certified copy, the court having venue shall hold a hearing, after having given such notice as the court may direct. At such hearing, the court shall either grant or deny the request contained in the application or shall dismiss the case as the findings of fact in the certified copy may indicate. [L. 1965, ch. 347, § 16; Jan. 1, 1966.]

59-3017. Transfer of venue, when. The venue of any case may be transferred at any time after the appointment of a guardian or conservator, when it is for the best interest of such ward or conservatee, to the county in which the ward or conservatee is or becomes a resident. Upon the filing of an application by any person interested in such ward or conservatee or in his estate, the court shall fix the time and place for the hearing thereof, notice of which shall be given to such persons and in such manner as the court shall direct. Upon proof that a transfer of venue is for the best interests of such ward or conservatee or his estate, and upon the settlement and allowance of the accounts of the conservator to and including the time of such hearing, the court, after making and retaining a true copy of the essential files, not previously recorded, shall transmit the original file to the court to which venue is transferred where all subsequent proceedings shall be had. [L. 1965, ch. 347, § 17; Jan. 1, 1966.]

59-3018. Guardian; rights and duties. A guardian shall be subject to the control and direction of the court at all times and in all things. He shall have charge of the person of the ward and unless otherwise limited by law shall have the right, if permission is granted by the court appointing the guardian, after hearing and notice thereof to the conservator, if any, and to such other persons and in such manner as the court shall direct, to establish the residence of his ward either within or without the state. [L. 1965, ch. 347, § 18; Jan. 1, 1966.]

59-3019. Conservator; rights and duties. A conservator shall be subject to the control and direction of the court at all times and in all things. He shall (1) prosecute and defend for his conservatee; (2) sell assets of the estate when the interests of the conservatee and his estate require the sale thereof; (3) pay the reasonable charges for the support, maintenance, and education of the conservatee in a manner suitable to his station in life and the value of his estate; but nothing herein contained shall release a natural guardian from obligations imposed by law as to the support, maintenance, and education of his minor children; (4) pay all just and lawful debts of the conservatee and the reasonable charges incurred for the support, maintenance, and education of his spouse and children; (5) possess and manage the estate, collect all debts and claims in favor of the conservatee, or with the approval of the court compromise the same; and (6) invest all funds, except such as may be currently needed for the debts and charges aforesaid and the management of the estate, in (A) such securities as are proper for the investment of trust funds, including securities approved by the comptroller of the currency of the United States for the investment of trust funds by national banks; (B) direct obligations of this state, any county or city or school district in this state;

(C) direct obligations of the United States government, and obligations, the interest and principal of which are both unconditionally guaranteed by the United States government; (D) legally issued notes of the owner of unencumbered real property located in this state secured by first mortgage or deed of trust thereon: *Provided*, That the total debt secured by such encumbrance does not exceed fifty percent (50%) of the actual cash value of such real property at the time of such investment; (E) the entire fee simple title to real estate or an interest therein: *Provided further*, That with the approval of the court the conservator may also acquire title to real estate whenever necessary to reasonably protect the investment or interest of his conservatee in such property: *And provided further*, That the title to real property acquired by the conservator shall in all cases be taken in the name of the conservatee; (F) shares or savings deposits in a federally insured savings and loan association; (G) may deposit the funds of the conservatee under a time deposit or in a savings account of an insured bank within the state of Kansas; (H) shares of investment trusts or mutual funds; (I) with approval of the court, the conservator may purchase a contract or contracts for annuities or for life, health or accident insurance on the person of the ward, or of another in whom the ward has an insurable interest, or a combination of any such contracts, provided such contract be payable to the ward or to his estate, be in the usual form and be issued by an insurance company authorized to do business in the state of Kansas. Any such contract shall reserve the right in the ward to change the beneficiary thereof after termination of his disability or incompetency; (J) as may be otherwise now authorized by the laws of the state of Kansas: *Provided*, That whenever and so long as the funds of the conservatee shall be invested as provided under (D) and (E) hereof it shall be the duty of the conservator to cause to be insured and to keep insured any and all buildings or other improvements located on such real property against loss or damage by fire, lightning, windstorm or hail, or any combination thereof, in a reasonable amount for the benefit of his conservatee as his interest may appear. [L. 1965, ch. 347, § 19; L. 1972, ch. 220, § 1; L. 1974, ch. 99, § 2; July 1.]

CASE ANNOTATIONS

1. Controlling as to court construction of instrument; intent of testator determined; trust created. Schauf v. Thomas, 209 K. 592, 601, 498 P.2d 258.

2. Cited in holding probate court not authorized to determine ownership and distribute assets in settling conservatorship estate. *In re* Estate of Ingram, 212 K. 218, 224, 510 P.2d 597.

59-3020. Original assets. A conservator may retain, until maturity, any security or investment which was a part of the trust estate as received by him even though such security or investment is not of the class considered as proper for the investment of trust funds, unless circumstances are such to require the conservator to dispose of such security or investment in the performance of his duties according to law. A conservator entitled to a distributive share of the assets of an estate or trust shall have the same right as other distributees or beneficiaries to accept or demand distribution in kind, and may retain any security or investment so distributed to him as though it were a part of the original estate received by him. [L. 1965, ch. 347, § 20; Jan. 1, 1966.]

59-3021. Power to lease for three years or less. A conservator may, subject to the approval of the court, lease for three (3) years or less the possession or use of any real estate of his conservatee whenever it appears to be for the best interests of the conservatee and his estate. [L. 1965, ch. 347, § 21; Jan. 1, 1966.]

59-3022. Sale, lease, mortgage. A conservator may, pursuant to article 23 of chapter 59 of the Kansas Statutes Annotated, sell, lease for more than three (3) years, or for oil and gas or other minerals, or mortgage any real estate of a conservatee subject thereto to provide for the support, maintenance, and education of the conservatee, his spouse and children, or whenever the personal property is insufficient to pay his debts and other demands against the estate, or whenever it shall be determined by the court that such sale, lease, or mortgage is for the best interests of the conservatee and his estate. [L. 1965, ch. 347, § 22; Jan. 1, 1966.]

59-3023. Sale of inchoate interest. The conservator of a spouse may, with or without notice, upon the order of the probate court, sell, convey, lease or mortgage, the inchoate interest of his conservatee in any real estate, except the homestead, the title to which is in the other spouse; but no conservator's deed or other instrument executed by virtue of such order shall be valid unless the other spouse, or if an adjudged incapacitated person, his conservator, shall join therein as one of the grantors thereof. [L. 1965, ch. 347, § 23; Jan. 1, 1966.]

59-3024. Extension of mortgage. A conservator may, subject to the approval of the court, make an extension of an existing mortgage, or of a prior extension thereof, for a period of five (5) years or less, if the extension agreement contains the same prepayment privileges and the rate of interest does not exceed the lowest rate in the mortgage extended. [L. 1965, ch. 347, § 24; Jan. 1, 1966.]

59-3025. No personal liability on mortgage note. No conservator shall be personally liable on any mortgage note or by reason of the covenants in any instrument of conveyance duly executed by him in his representative capacity. [L. 1965, ch. 347, § 25; Jan. 1, 1966.]

59-3026. Allowance and payment of demands against conservatee's estate; funeral expenses and expenses of last illness; disposition of remaining assets; discharge of conservator, when. Any person having a demand, other than tort, against the estate of a conservatee, or against his conservator as such, may present it to the probate court for determination, and upon proof thereof procure an order for its allowance and payment. Upon the death of a conservatee, the conservator upon order of the probate court may pay appropriate funeral expenses and the expenses of the conservatee's last illness, in such amounts as are reasonably necessary, with due regard to the assets and rights of creditors. If there remain assets in the estate of the deceased conservatee after any such payments, they shall be held by the conservator until the court directs the disposition thereof and the conservator shall not be discharged until such funds are transferred as directed according to law by the court. If the funeral and last illness expenses and expenses of closing and final accounting will deplete the estate, the conservator shall so show on the hearing for final accounting and if the court finds the final account is correct, it may discharge the conservator and his sureties. [L. 1965, ch. 347, § 26; L. 1970, ch. 231, § 1; July 1.]

59-3027. Restoration to capacity; procedure. Any ward or conservatee who has been found to be an incapacitated person or any person on his behalf may file a verified application for restoration to capacity in the probate court which has venue of the guardianship or conservatorship. The application shall state:

(A) The name of the ward or conservatee;

(B) the name and address of the nearest relatives of the ward or conservatee;

(C) the name and address of the guardian or of the conservator;

(D) a request for restoration to capacity: *Provided*, That the court may refuse to hear said application for six (6) months from either the date of the original adjudication finding the ward or conservatee to be an incapacitated person, or for six (6) months from the date of any subsequent hearing on an application for restoration.

Upon the filing of the application, the probate court shall proceed with a hearing in the same manner and with the same powers as if an application, pursuant to K. S. A. 1965 Supp. 59-3009, had been filed in said court: *Provided*, That the court need not issue the orders provided for in K. S. A. 1965 Supp. 59-3010.

Upon the completion of the hearing, if the probate court finds that such ward or conservatee continues to be an incapacitated person, the probate court shall deny the application for restoration to capacity. If the court finds that such ward or conservatee is no longer an incapacitated person, the court shall order such ward or conservatee restored to capacity. [L. 1965, ch. 347, § 27; L. 1967, ch. 321, § 1; July 1.]

59-3028. Termination of guardianship or conservatorship, when. The guardianship of a ward or the conservatorship of a conservatee shall terminate upon any of the following conditions:

(A) When the ward or conservatee is an incapacitated person;

(1) upon an order of the court after a finding that there is no further need of the guardianship or conservatorship;

(2) upon the death of the ward or conservatee;

(3) upon the restoration to capacity of the ward or conservatee;

(B) when the ward or conservatee is a minor;

(1) upon an order of the court after a finding that there is no further need of the guardianship of [or] conservatorship;

(2) upon the death of the ward or conservatee;

(3) upon the attainment of legal age of the ward or conservatee;

(4) upon the marriage of the ward or conservatee: *Provided*, That the conservatorship shall not be terminated unless by such marriage the rights of majority are thereby conferred upon such conservatee;

(C) when the conservator was appointed pursuant to section 8 [59-3008] of this act;

(1) upon an order of the court after a finding that there is no further need of the conservatorship;

(2) upon the death of the conservatee;

(3) upon the finding that the conservatee is an adjudged incapacitated person;

(4) upon the filing of a verified application by the conservatee that he no longer desires to have the conservatorship continue. [L. 1965, ch. 347, § 28; Jan. 1, 1968.]

CASE ANNOTATIONS

1. Cited in holding probate court not authorized to determine ownership and distribute assets in settling conservatorship estate. *In re* Estate of Ingram, 212 K. 218, 224, 510 P.2d 597.

59-3029. Accounting and settlement. Except where expressly waived by the court, every conservator shall annually present a verified account covering the period from the date of appointment or the last account. At the termination of the conservatorship or upon the conservator's removal or resignation, he or his surety, or in the event of his death or incapacity, his representative or surety, shall present a verified final account with an application for the settlement and allowance thereof; and such conservator or his estate shall not be discharged from liability until such account is presented, settled, and allowed. [L. 1965, ch. 347, § 29; Jan. 1, 1968.]

CASE ANNOTATIONS

1. Cited in holding probate court not authorized to determine ownership and distribute assets in settling conservatorship estate. *In re* Estate of Ingram, 212 K. 218, 224, 510 P.2d 597.

59-3030. Notice for accounting. The court may on its own motion and shall upon the application of the conservator or any person interested in the conservatee or his estate fix the time and place for the hearing of any account, notice of which shall be given to such persons and in such manner as the court shall direct. Whenever any funds have been received from the veterans' administration, notice by mail shall be given to the regional office having charge thereof. [L. 1965, ch. 347, § 30; Jan. 1, 1968.]

CASE ANNOTATIONS

1. Cited in holding probate court not authorized to determine ownership and distribute assets in settling conservatorship estate. *In re* Estate of Ingram, 212 K. 218, 224, 510 P.2d 597.

59-3031. Hearing on accounting. On the hearing, unless otherwise ordered, the conservator shall, and other persons may, be examined. If the account is correct, it shall be settled, and allowed. The order of settlement and allowance shall show the amount of the personal property remaining. Upon settlement of the final account, and upon delivery of the property on hand to the person entitled thereto, the court shall discharge the conservator and his sureties. [L. 1965, ch. 347, § 31; Jan. 1, 1968.]

CASE ANNOTATIONS

1. Cited in holding probate court not authorized to determine ownership and distribute assets in settling conservatorship estate. *In re* Estate of Ingram, 212 K. 218, 224, 510 P.2d 597.

59-3032. Costs; payment by resident county, when. In each proceeding the court shall allow and order paid to any individual or institution as a part of the costs thereof a reasonable fee and expenses for any professional services ordered performed by the court pursuant to this act other than those performed by any individual or institution under the jurisdiction of the state board of social welfare, but including the fee of counsel for the proposed ward or proposed conservatee or ward or conservatee when counsel is appointed by the court. Other costs and fees shall be allowed and paid as are allowed by law for similar services in other cases. The costs shall be taxed to the estate of the proposed ward or proposed conservatee or ward or conservatee, to those bound by law to support him or to the county of the residence of the proposed ward or proposed conservatee or ward or conservatee as the court having venue shall direct. Any probate court receiving a statement of costs from another probate court shall forthwith approve the same for payment out of the general fund of its county except that it may refuse to approve the same for payment only on the grounds that the proposed ward or proposed conservatee or ward or conservatee is not a resident of its county. In such case it shall transmit the statement of costs to the state department of social welfare which shall determine the question of residence and certify its findings to each probate court. If the claim for costs is not paid within thirty (30) days after such certification, an action may be maintained thereon by the claimant county in the district court of the claimant county against the debtor county. The findings made by the state department of social welfare as to the residence of the proposed ward or proposed conservatee or ward or conservatee shall be applicable only to the assessment of costs. Any county of residence which pays from its general fund court costs to the probate court of another county may recover the same in any court of

competent jurisdiction from the estate of the proposed ward or proposed conservatee or ward or conservatee or from those bound by law to support him, unless the court shall find that the proceedings in which such costs were incurred were instituted without probable cause and not in good faith. [L. 1965, ch. 347, § 32; Jan. 1, 1968.]

59-3033. Incompetent person designated incapacitated person; guardian of estate designated conservator; lawfulness of prior acts. Any person heretofore adjudged an incompetent person shall hereinafter be designated an incapacitated person. Any guardian of the estate heretofore appointed by any probate court of this state shall hereinafter be designated a conservator. Every right, power, duty and obligation made applicable to a conservator by this act shall be applicable to such heretofore designated guardian of the estate. No act of such guardian of the estate or of a guardian of the person, which was lawfully done under the then existing law, shall be deemed unlawful by virtue of any of the provisions of this act. [L. 1965, ch. 347, § 33; Jan. 1, 1968.]

59-3034. Invalidity of part. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable. [L. 1965, ch. 347, § 34; Jan. 1, 1968.]